IN THE SUPREME COURT OF THE STATE OF MISSOURI

In the Interest of K.A.W. and K.A.W.) SC 085683

RESPONDENT'S BRIEF

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Reference Note

All statutory references are to the Revised Statutes of Missouri, 2000. References to the Legal File are denoted "L.F." References to Respondent's Supplemental Legal File are denoted "R.Supp.L.F." References to the Transcript are denoted "T." References to Appellant's Appendix are denoted as "A.App." References to Respondent's Appendix are denoted as "R.App." References to admissions in Appellant's Brief are denoted "A.B."

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CASES

STATUTES

STATEMENT OF FACTS

The children, K.A.W. and K.A.W. ("the twins"), were born on June 26, 2000 (L.F. 104). Appellant, T.W., is the mother of the twins (L.F. 104). A.W. is the father of the twins ("Father", L.F. 105). On March 22, 2002, in its Findings and Judgment of Jurisdiction ("Jurisdictional Order") the court found the twins were without proper care, custody and support after a hearing (L.F. 113). On May 24, 2002, in its Findings and Judgment of Disposition ("Dispositional Order"), the court found it was not in the best interest of the twins to be in the physical custody of Appellant or Father and they were placed in the physical custody of the Missouri Division of Family Services ("DFS") after a hearing (L.F. 113).

While Appellant filed a notice of appeal with respect to the Dispositional Order, she never followed through with that appeal (R.App.66-73). The Missouri Court of Appeals, Eastern District, dismissed her appeal because she failed to comply with the Supreme Court Rules 81.12(d) and 81.18 (R.App. 73)[1]. Appellant never appealed the Jurisdictional Order.

[1] For simplicity, the Dispositional Order will be referred to throughout this brief as an unappealed Order, although, in fact, a notice of appeal was filed, and the appeal was dismissed for Appellant's failure to comply with the Rules.

On December 12, 2002 the court terminated the parental rights of Appellant and Father to the twins (L.F. 103-111). Father consented to the termination of his parental rights (A.App.4).

All of the facts and testimony cited herein were heard at the unappealed Jurisdictional and Dispositional hearings, unless stated otherwise. Appellant presented no witnesses at the Jurisdictional hearing (T. 596). All of Appellant's witnesses were put on at the Dispositional hearing (T. 596).

Appellant also failed to present any witnesses or evidence at the hearing on the Petition to Terminate Parental Rights ("TPR") (T. 1942). The termination was based primarily, by stipulation of the parties, on the facts already in evidence at the previous, unappealed Jurisdictional and Dispositional hearings and their resulting Orders (T. 1883). Any testimony or facts cited herein that were presented at the TPR hearing will be so identified.

Appellant's early vacillation about keeping the twins

Appellant learned of her pregnancy in January 2000 (L.F. 126). Shortly thereafter, as early as February 2000, Appellant first decided to give the twins up for adoption (T. 107-109, 146, 1445, 1043-1045). She even found an adoption facilitator, Tina Johnson, prior to the twins' birth (T. 120, 1449).

While pregnant, Appellant was prescribed medication to avoid the twins' premature birth (T. 186, 1516). Appellant stopped taking the medication in early June 2000, without approval from a doctor (T. 1516). Appellant did not even know if she told the doctor she stopped taking the medication (T. 1516).

Appellant said she stopped taking the medication because she "didn't want to be pregnant, it was so hot, I felt like a house, I didn't feel attractive, it was okay if the babies came" (T. 1516-1517, 1035).

The babies did come, prematurely, on June 26, 2000, shortly after Appellant stopped taking the medication (T. 186, 1451). The twins weighed barely over two pounds each at birth (T. 112, 1517). Both twins had eye problems and asthma and one twin had a lung problem (T. 112). Two years later, the twins still required asthma treatments, sometimes as often as four or five times a day (T. 299).

Shortly after their birth, Appellant changed her mind and decided to keep the twins, who were hospitalized due to their premature birth, until August 25, 2000 (T.110-112, 157, 1454-1455). Appellant testified that, when the twins were released, she took them to O'Fallon, where she was living with her three other children (T. 1454). Appellant's mother, Eula Gunn, however, testified Appellant and the twins came to her home when they left the hospital (T. 1267-1268).

Appellant's problems and lack of care for her other children

Appellant testified her children have always lived with her and she was overwhelmed caring for five children after the twins' birth (T. 1459, 1490-1492). Appellant's mother, Ms. Gunn, however, testified that Appellant's two boys, J.G., age 14 and J.S., age 10, both lived with her on and off all of their lives, and both have lived continuously with her since August 2000 (T. 1243, 1266; L.F. 138; A.App.36.).

Moreover, Appellant admitted to Sandra Bates, a DFS investigator, that J.G. lives with Ms. Gunn and J.S. stays with her periodically (T. 118). Appellant's sister, Tracy Conley, also testified that the boys have lived with Ms. Gunn for most of their lives (T. 1687). Conley said Ms. Gunn has always taken care of the boys, although sometimes they also lived with Appellant, who also at times resided with her mother (T. 1687, 1691). In addition to the two boys, Appellant has a daughter, N.W., age 4 (T. 231, 1118). The boys are not Father's children. (T. 1624, 1659-60).

In 1998, Appellant missed a doctor's appointment for J.G. and he was subsequently hospitalized and diagnosed with severe heart problems (T. 568-569, 1232). Since than he has had two open-heart surgeries (T. 1232). The children's pediatrician, Dr. Robert Strashun, said Appellant missed at least six appointments for J.G., she also missed at least four appointments for N.W. (T. 569). Appellant's mother, Ms. Gunn testified she is the person who now takes care of J.G.'s medical needs, not Appellant (T. 1232).

In September 2000, Appellant missed the twins' first pediatric appointment (T. 564-565; L.F. 128; A.App. 26). Dr. Strashun testified this appointment was very important for the twins, especially because they were premature (T. 565). Dr. Strashun felt missing this appointment was unacceptable care for the twins and he was concerned Appellant's continued care of the twins might be a problem (T. 566-568, 570, 588). He further stated he did not feel Appellant could give proper attention to the twins (L.F. 137; A.App. 35).

Appellant also has a history of involvement with DFS. In 1993, J.S. was placed in foster care with DFS because he had been left alone in his crib at 20 months of age (T. 355-357). J.G. was living with Appellant's mother, Ms. Gunn, at the time (T. 1490). Appellant told DFS that Father was watching the child, although Father testified Appellant was the one who left J.S. alone (T. 792-794, 1518-19).

DFS returned J.S. to Appellant with services to teach her about nutrition and proper supervision (T. 357-358). Shortly thereafter, both boys were removed from Appellant and returned to foster care because she had not made progress with the services provided by DFS (T. 358, 1519-20, 1522). Appellant's home had no gas, the electricity was about to be shut off, Appellant was not feeding J.S. properly and failed to get proper medical attention for him (T. 358). J.S. had ringworm on the entire back of his head, he was underweight and he was delayed in growth, language, socialization skills and learning (T. 359).

Appellant denied the boys were removed from her for these reasons (T. 1521). Instead, Appellant testified to a story about J.G. not being able to get a pop tart out of the toaster and the DFS worker having her own agenda, including she did not like that Appellant's children being raised by A.W., a white man, as the reason the boys were removed (T. 1521).

J.G. was placed back with Appellant's mother, Ms. Gunn, and J.S. went to a foster home (T. 359-60). Ms. Gunn did not want J.S. because he cried too much (T. 360). When physical custody was returned to Appellant six months later, J.G.

stayed with Ms. Gunn (T. 361). DFS objected to returning the boys to Appellant, but did so pursuant to a court order (T. 361). DFS returned legal custody to Appellant after one year, again over their objection, pursuant to a court order (T. 362).

At the time of the Dispositional hearing in 2001, Appellant's mother, Ms. Gunn, testified that seven people lived in her home: her husband, her son, Appellant, the two boys, and every other week N.W. (N.W. spent every other week with Father) (T. 861, 1274-1276, 1512). If the twins were returned to Appellant, that is where they would go (T. 1273-1274, 1514). That would make nine people in Ms. Gunn's home (T. 1519). The occupancy permit for Ms. Gunn's two-bedroom home allows for four people (T. 1257).

Appellant's numerous and unstable employment situations

Appellant had at least twenty-four jobs between March 1997 and September 2000 (R.Supp.L.F. 32; R.App. 101). Appellant began working at Biomedical Systems one month after the twins were born (T. 1452). Less than two months later, Appellant lost that job (T. 1452, 1549). At Disposition, Appellant had been working at the Balloon Factory for about two months (T. 1606, 1617). Appellant considered that job stable (T. 1617).

Appellant explained her numerous jobs saying she had to quit because of the media "crap" surrounding the twins (T. 1617). Appellant then admitted she had more than twenty jobs before the case hit the media (T. 1617). Next Appellant testified she quit her past jobs because of stress (T. 1617-1618). This

stress included getting her daughter, N.W., back and forth from daycare and her son being hospitalized three times (T. 1617-18). Appellant testified at Disposition that the stress was no longer there (T. 1618). However, Appellant still has to bring N.W. to daycare and her son could go back in the hospital at any time (T. 1618-1619).

Appellant also explained her numerous jobs saying they were through temporary agencies (T. 1607). Appellant, however, then admitted holding the following eleven jobs that were not with employment agencies: IHOP, Oxcy Health, Papa Johns USA, WalMart, Ambassador Mortgage, Sunshine Companies, Title Loan Co., May Department Stores, Playmate Learning, Shop 'n Save and K-Mart (T. 1606-1610). Appellant held most of these jobs for less than three months, one of them she had only one day (T. 1606-1610; R.Supp.L.F. 32; R.App. 101). Appellant also worked for four different temp services (T. 1609-1610). This was all in the course of five years (T. 1610-1611).

Appellant had no idea what her total earnings from her jobs were in 1999, 2000 or 2001 (T. 1664-1665). In fact, Appellant could not recall how much she had earned in any year of her adult life (T. 1665). Appellant admitted she had not filed taxes in 1999 or 2001 (T. 1664-65).

Appellant commits numerous counts of welfare fraud

Appellant pled guilty to ten counts of welfare fraud (T. 1501). These incidents took place from 1997 through 2001 (T. 1598). Appellant testified the reason she committed these acts of fraud was because, from 1997-2001 she was

working for temporary services and "some days I worked one day and other days I worked thirty days" (T. 1600). Appellant testified she pled guilty to all ten counts and half the things she did, and half the things she did not do (T. 1600-1601).

These counts of fraud included facts relevant to the case at bar. For example, Appellant admitted in the Stipulation of Facts Relative to Sentencing that, on an application for food stamp benefits dated January 2, 2001, she falsely listed her household as including all five of her children (R.Supp.L.F. 24; R.App. 93). Appellant also admitted that, at that time, the twins had been placed for adoption and the two boys resided with their grandmother (R.Supp.L.F. 24; R.App. 93). Appellant also admitted, in an application for benefits dated August 9, 2000, that she did not receive employment income when she had been employed by Biomedical Systems since July 26, 2000 (R.Supp.L.F. 22; R.App. 91). There are numerous other admittedly false representations in the Stipulation (R.Supp.L.F.16-32; R.App. 85-101).

Appellant's stressful life and decision, again, to have the twins adopted

Appellant testified, when the twins were born, she had no money, the twins' father was not helping, she had five kids and she was feeling overwhelmed and scared (T. 1459). Appellant testified her mother, Ms. Gunn, helped with the boys, but the girls were for Appellant to "deal with" (T. 1458). Appellant said she was not getting much support from her mother, who did not really want her in the house (T. 1036). Appellant, however, also said her mother offered to help her

with the twins, but Appellant refused her offer (T. 1530-31). Appellant's mother said Appellant could not handle the twins (L.F. 136. A.App.34).

Appellant said she had no alternative but to place the twins up for adoption in California (T. 1528-29). However, Appellant's cousin, Patricia McKinnis, said she would have adopted the twins, but Appellant never told her about the adoption (T. 1322, 1528). In addition, Appellant admitted another cousin and aunt had offered to help and even to take the twins before she placed them for adoption, but Appellant never talked to them either (T. 1004, 1010-11, 1529). Appellant's sister, Ms. Conley, testified all of Appellant's relatives were supportive of her when the twins were born (T. 1682-84). However, Ms. Conley did not learn of the twins adoption until everyone else, from the news (T. 1681).

When the twins were born, Appellant told her mother she did not want her family to have the twins; she wanted a wealthy family to take the children (T. 1244; L.F. 138; A.App. 36). At the Dispositional hearing, Appellant said if she did not get custody, she wanted her mother to have the twins so they would be in the family (T. 1530).

Appellant places the twins with the Allens in California for adoption, and then removes them

In October 2000, the adoption facilitator, Tina Johnson, gave Appellant the name of the Allens and Appellant chose them to adopt the twins because "they were well off" (T. 1459-60, 1542-1543). On October 11, 2000, when the twins were three and a half months old, Appellant took the twins from her mother's

home to California to be adopted by the Allens (T. 122, 1267-68). The twins had lived with Appellant for less than two months (T. 111, 1454).

The Allens paid for Appellant's airfare to California (T. 111, 1542). Ms. Allen gave Appellant diamond earrings valued at $100.00 (T. 124, 1471, 1496-1497). Additionally, Appellant told the DFS investigator Ms. Allen paid about $50 for Appellant to have her hair braided (T. 124). At the Dispositional hearing, however, Appellant denied the Allens paid for her hair braiding, but admitted she had her hair braided, the braiding cost over $50 and, at the time, she had just lost her job and was overwhelmed financially (T. 1549-50).

Appellant said the Allens agreed to an "open adoption" (T. 1465). Appellant said she understood this meant she would get pictures and letters (T. 1465). Appellant understood the "open adoption" agreement could not be put in the paperwork, but on October 14, 2000, Appellant signed the consent to placement agreement anyway (T. 1543, 1465-66, 1546-47; L.F. 116; A.App. 14).

After leaving the twins with the Allens, Appellant says she spoke with the Allens practically every day (T. 1553). In one of those numerous conversations, Appellant says Ms. Allen acted nonchalant and was not warm to her, so she felt like the Allens were not going to follow through with the open adoption (T. 1473, 1554-55). Appellant said this, plus the fact Ms. Allen supposedly called Appellant's aunt and told her they were having financial difficulty, made Appellant change her mind about the Allen's adopting the twins (T. 1553-1555). Appellant told the DFS investigator she decided to get the twins after she learned

the Allens bounced a $2,500.00 check to Tina Johnson (T. 126, 192-193). At Disposition, Appellant denied she knew about the $2,500.00 check until after she had taken the twins from the Allens (T. 1557-1560, 1648-1649).

On November 28, 2000, Appellant went, with her daughter N.W., to California to remove the twins (T. 1555). Tina Johnson paid for the trip (T. 1555). Appellant told Ms. Allen she was simply coming out to see the girls. She did not tell Ms. Allen she was going to remove them (T. 1473-75). The next day Appellant took the twins from the Allens (T. 1477; L.F. 116). Appellant had not seen the twins since October 19, 2000 (T. 1551-1552). When she took the twins away from the Allens, Appellant knew she was going to give the twins to someone else to adopt (T. 1475-1476, 1562).

Appellant gives the twins to the Kilshaws from the U.K., by way of an Arkansas adoption

Appellant had considered the Kilshaws earlier, but did not choose them because Johnson told her the adoption could not be done in the U.K. (T. 1536). Appellant said she was later told they were going to do the adoption in Missouri (T. 1536). Appellant also expected the adoption with the Kilshaws to be "open," in that she expected to exchange pictures and phone calls (T. 1475-76). Appellant said the Kilshaws told her on the twins' birthday they would bring them to the U.S. to see her, or she could travel to England to see them. Appellant chose the Kilshaws because she thought it would be a good opportunity for her to travel to

England (T. 211). The Kilshaws, like the Allens, never signed any document promising an open adoption (T. 1593).

On December 1, 2000, the Kilshaws met Appellant and her older daughter in California (T. 1477). A few days later, Appellant, the three children and the Kilshaws left California and drove to St. Louis after getting lost in Mexico (T. 1478-1479, 1562). While with the Kilshaws, Appellant intended the Kilshaws to be the twins' primary caretakers (T. 1571, 1661-62).

Appellant admitted she did much of the driving, although her Missouri driver's license was suspended (T. 1564-65). At one point, the group was pulled over in Kansas for speeding (T. 132-133, 1566). To avoid getting a ticket, Appellant and the Kilshaws decided to lie to the police officer by saying one of the twins was sick and they were taking her to the hospital (T. 132-133, 1566). Appellant actually took one of the twins to the hospital and told them the child had a fever and had been vomiting up formula when she ate (T. 135; R.Supp.L.F. 161-163; R.App. 232-234). The child seemed fine to hospital attendants, but they told Appellant to push fluids with the child and to follow-up with her pediatrician at home (T. 135-136; R.Supp.L.F.161,165; R.App. 232, 236).

When they got back to St. Louis, the Kilshaws bought Appellant $315.00 worth of clothes and toys for her other children (T. 136-137). Later, the Kilshaws purchased an additional $150.00 worth of clothes for one of her children (T. 139).

About December 6, 2000, Appellant and the Kilshaws got back in the van with the twins and headed to Arkansas to do the adoption (T. 1479,1581-1583;

L.F. 157). Appellant said she refused to sign an affidavit stating she lived in Arkansas because she did not want to lie (T. 1482). However, Appellant admitted giving the Kilshaws' attorney an address of an aunt who lived in Arkansas to use (T. 1480-1482). Appellant admitted the attorney told her they could not do the adoption if she did not live in Arkansas (T. 1666). Appellant also told Dr. Randich, in her psychological evaluation, she knew she had to be an Arkansas resident for the adoption, which is why she used her aunt's address (T. 1037-1038). During the Dispositional hearing, Appellant maintained she did not lie to the Arkansas court regarding her residency and said she did not know someone had to be a resident in Arkansas to do the adoption (T. 1586-87, 1667; L.F. 149).

On December 22, 2000, based on Appellant's consent, the court in Arkansas granted the Kilshaw's adoption petition (L.F. 116; A.App. 14). On December 29, 2000, the Kilshaws took the twins to the U.K. (L.F. 116; T. 1483). Less than one month later, the High Court Justice in the United Kingdom placed the twins in the custody of Children's Services for foster care, based on allegations of unfitness of the Kilshaws (L.F. 116; A.App. 14). On March 6, 2001, the Judge in Arkansas set aside its Adoption Decree, finding the court lacked jurisdiction, since neither adoption petitioners nor the natural parents were residents of Arkansas (L.F. 117; A.App. 15). The court in Arkansas found Appellant perpetrated a fraud on the court regarding her residency in Arkansas (L.F. 149; A.App. 47). The trial court concurred with the Arkansas Judge and found

Appellant perpetrated a fraud in connection with the adoption of the twins in Arkansas (L.F. 149; A.App. 47).

Appellant wants the twins back because of the allegedly false allegations about her

Appellant admitted she wanted the twins back because she was upset by the allegedly false allegations she sold the twins on the internet (T. 1485, 1595; A.B. 16). Appellant admitted she did not want the twins back until after the case hit the national media in January of 2001 (T. 1596). When asked why she wanted the twins back, Appellant testified only, "I wanted my girls back. People change their minds all the time" (T. 1595).

The twins return to Missouri and come into foster care

On or about March 27, 2001, the Juvenile Officer alleged Appellant violated Section 453.110 RSMo. by transferring custody of the twins from St. Louis to the Kilshaws for purposes of adoption without an order from the Missouri court where the children resided (L.F. 27). The Juvenile Officer further requested the court order an investigation and the twins come into DFS custody pursuant to Section 453.110 RSMo. Appellant stipulated to the facts on which the court based its finding that she violated Section 453.110 RSMo. (L.F. 38-41, 131; R.Supp.L.F. 11-14; R.App. 79-82A.B. 17) (A.B. 17; L.F. 38-41). Accordingly, the court entered an Order accepting the stipulation of Appellant and bringing the twins into DFS care (L.F. 40-41; A.App. 49-50). This Order was not appealed.

In addition, on April 18, 2001, the day the twins returned to Missouri, the Juvenile Officer filed a Petition pursuant to Section 211.031 RSMo. alleging the twins were without proper care, custody or support. The Petition also alleged Appellant's actions subjected the twins to numerous placements within a few months, and these multiple placements were not in the best interests of the children (L.F. 44).

On April 23, 2001, the court issued a Protective Custody Order and found probable cause existed to believe the juveniles were without proper care, custody or support and, therefore, were within the jurisdiction of the court pursuant to Section 211.031 RSMo.. The Protective Custody Order further held that the best interests of the juveniles required they remain in protective custody with DFS (L.F. 47-48). This Protective Custody Order was pending jurisdictional and dispositional hearings on the matter. These hearings were held almost a year later in the spring of 2002 (T. 2).

The twins placement with foster family and Appellant's continued vacillation regarding adoption of the twins

On April 18, 2001, the twins arrived in St. Louis and were placed directly with a foster family (L.F. 132; T. 1611-1612). This was the twins' fifth home setting in the first twenty-two months of their lives (T. 397). The twins have remained in foster care continuously since that date with the same foster family (L.F. 132; T. 144).

When the twins came into care they were apathetic, somber, not interactive, quiet and had a low level of activity and play (T. 293, 331). The twins would go to anyone and did not seem upset when removed from the foster parents (T. 331). During the first three months of foster care, the twins did not initiate contact with the foster parents and did not cry when the foster parents left the room (T. 292-293). When the foster parents picked them up, the twins showed no emotion (T. 295). The foster parents had to teach the twins to hug each other (T. 297).

After the twins had been with the foster parents for approximately three months, there was a 180-degree turn (T. 294, 296-297). The twins were now very active, always into things, loving, attentive and fighting to sit on the foster parents' laps (T. 296-297). When they were reunited with the foster parents after brief absences, the twins were happy, smiling and would kick with joy (T. 340).

Appellant admitted she considered allowing the foster parents to adopt the twins (T. 1615). On June 7, 2001, Appellant told Ms. Sippy, the DFS worker, she would not be opposed to the foster family adopting (T. 343). On June 8, 2001, Appellant asked Ms. Sippy if she still needed to have the court ordered psychological evaluation, since she did not want to reunify with the twins (T. 343-344). In June of 2001, at a visit with the twins, Appellant told Ms. Sippy it was probably the last time she would see the twins before she voluntarily signed termination of parental rights papers (T. 371, 445).

Appellant told Ms. Sippy she wanted to meet with the foster family to discuss adoption (T. 343, 1611). At the first meeting in July of 2001, Appellant

discussed adoption with the foster parents (T. 1611-1612). Appellant told the foster parents the only thing that had changed in her life since she first decided to give up the girls was she now had a boyfriend named Mike Thompson for support, otherwise she was in the same situation (T. 348). Appellant and Mike had been dating for four months when the twins were born (T. 1739). He was at the hospital for their birth (T. 1748).

In a phone conversation on August 9, 2001, Appellant told Ms. Sippy she had changed her mind about having the foster family adopt (T. 348). Appellant, however, requested Ms. Sippy set up a second meeting with the foster family so she could get to know them better to decide if she wanted the twins to be adopted by them (T. 349). At that meeting, she told the foster parents she wanted to make another "run of taking care of the children" (T. 304).

When asked at the Dispositional hearing what had changed in her life and what assurances she would make she would not change her mind again about caring for the twins, Appellant said now she was stable, had a terrific job, a terrific guy and her family to back her up (T. 1616). Appellant had her job for two months, she knew her boyfriend, Mike Thompson when the twins were born, and her family testified they were available to help her when the twins were born (T. 1616-1617).

Appellant appeared on the Saint Louis news, channel 4, just before the Jurisdictional hearing and stated she was the victim in this case (T. 1676). Appellant testified she was the victim because Father did not financially or

mentally support her in the ten years they had known each other and things were his fault (T. 1676-1677). Appellant testified she did not know if her children had been victimized by her actions or harmed by her mistakes (T. 1675, 1677).

DFS never considered placement with relatives because none ever came forward saying they would care for the twins

When the twins came back from the U.K. on April 18, 2001, none of Appellant's family members came forward to take the twins (T. 397, 423). At the first Family Support Team Meeting, on April 27, 2001, Ms. Sippy told Appellant, if any of her relatives were interested in the twins, they should contact her - none did (T. 414, 425, 428).

Appellant's mother, Ms. Gunn, testified she called DFS and said she would take the twins, but, in the same phone conversation, she changed her mind (T. 1247-1249; L.F. 135-136; A.App. 33-34). Ms. Gunn said she did not want to disturb the bond the twins had with the foster parents (T. 1247-1249; L.F. 135-136). The twins had been with the foster parents for a month and a half at the time (T. 1248). Ms. Gunn testified she was just throwing out the idea in the phone call and did not really want to pursue adoption (T. 424). Ms. Gunn had the phone number of the DFS workers, but did not contact them regarding adoption again (T. 1250). On March 13, 2002, just five days before the Jurisdictional hearing, Ms. Gunn filed a motion to intervene in the Jurisdictional hearing (L.F. 70; T. 2). This was nearly a full year after the twins were placed in foster care in Missouri (L.F. 70; T. 2). The motion was denied (L.F. 79).

When the twins were first back in Missouri, Tracy Conley, Appellant's sister, said she thought they were better off with foster parents because of Appellant's job stress, financial stress and child raising stress (T. 1692). Ms. Conley testified Appellant still has those stresses today (T. 1692).

The twins lack emotional ties to Appellant

When the twins came into care, Appellant was allowed twice monthly visits with them (T. 324). During the visits, the twins would sometimes try to distance themselves from Appellant by turning and crawling away (T. 338). When Appellant tried to hug them, they would just look at her, sometimes they would back away (T. 518). The twins had no physical contact with Appellant unless she approached them (T. 518, R.Supp.L.F. 157; R.App. 228). When Appellant left, the twins would simply resume playing and did not cry (T. 338, 521).

Ms. Flory, the person who facilitated visits at Heritage House between Appellant and the twins, kept meticulous notes of the visits (R.Supp.L.F. 48-157; R.App. 117-228). By August 28, 2001, four months after the twins had been in care, Ms. Flory observed the twins have gotten more comfortable at Heritage House, but that comfort level did not have an effect on them becoming connected to Appellant (R.Supp.L.F.53; R.App. 122). The twins remained indifferent, sometimes engaging with Appellant and sometimes not (R.Supp.L.F. 53-54; R.App. 122-123). By September 28, 2001, Ms. Flory noted the twins exhibited a high degree of stranger anxiety around Appellant (R.Supp.L.F. 57, 103; R.App. 126, 174).

At the January 12, 2002 visit, Ms. Flory noted when the twins were tired or upset, they looked to her, not Appellant, for comfort (R.Supp.L.F. 157; R.App. 228). When the twins needed help with toys, they brought them to Ms. Flory, not Appellant (R.Supp.L.F. 157; R.App. 228). Further, Appellant mixed up the girl's names, miscalling them and continued to miscall their names throughout the visit (R.Supp.L.F. 157; R.App. 228). At the end of the visit one of the twins allowed Appellant to hug her, then went to Ms. Flory, lay against her back, grabbed her around the neck and laid her head on Ms. Flory's shoulder (R.Supp.L.F. 157; R.App. 228). The twins did not show this kind of affection toward Appellant (R.Supp.L.F. 157; R.App. 228).

Appellant's psychological evaluation finding she is immature and impulsive

On July 25 and August 1, 2001, Appellant had a psychological evaluation by Dr.Susan Randich (L.F. 54). Dr. Randich stated Appellant suffered from no psychological condition which would necessitate terminating her parental rights and that, from a psychological perspective, she was not an unfit parent per se (T. 1026, 1049, 1051.)

However, the evaluation showed Appellant demonstrated impulsivety and poor judgment (L.F. 60; T. 1019-1020). Dr. Randich testified these were well-ingrained personality characteristics and she would not expect Appellant to radically change these characteristics (T. 1019-1020). Further, these conditions have a negative impact on Appellant's parenting abilities (T. 1054).

Dr. Randich testified Appellant's decision to stop taking the medication prior to the twins' birth was an example of Appellant's impulsive behavior (T. 1033). Appellant told Dr. Randich she stopped taking similar medication during a previous pregnancy (T. 1023). Dr. Randich also felt Appellant's decision to place the twins for adoption was an example of her impulsive and poorly thought out behavior (T. 1042-43).

Appellant's test scores indicated Appellant is an immature person who uses repression and denial excessively as defenses (L.F. 60). The scores also indicated Appellant has a low tolerance for stress, meaning she may have more difficulty parenting (T. 1018-1019, 1025, 1053). Dr. Randich was concerned about the level of stress Appellant would be under if the twins were returned (T. 1025). She was also concerned about Appellant's limited family support (T. 1025). Dr. Randich noted Appellant felt criticized and unsupported in relationships with her mother and her sister. Appellant did not appear to have a well-developed network of family relationships (T. 1048, 1059-60).

In addition, Dr. Randich testified Appellant is concerned about how she is perceived by others and she is aware of the socially correct response to various situations (T. 1020). Further, Dr. Randich testified Appellant did not have a psychological attachment with the twins and the twins were not likely to be attached to Appellant (T. 1051).

Dr. Randich also testified Appellant's test scores indicated she has little insight into her own behavior and motivations and little awareness of the

consequences of her behavior on her children (L. 1040-41). Dr. Randich stated Appellant "is an immature individual with longstanding problems in adjustment that are likely to have an effect on her ability to cope with the everyday problems of life" (T. 1033, 1058). Further, Dr. Randich testified, regarding Appellant, "the best predictor of future behavior is past behavior" (T. 1041).

Appellant's actions result in the twins suffering Reactive Attachment Disorder

Dr. Luby, a child psychiatrist, testified at the Jurisdictional hearing regarding the harm done to the children due to the multiple placements (T. 23-24, 34-35). Dr. Luby is an attending psychiatrist at the Washington University School of Medicine Child and Adolescent Psychiatry Clinic with four years of medical school, three years general psychiatry residency and two years subspecialization in child psychiatry training, all of which she completed in 1990 (T. 8; R.App. 108). Dr. Luby specializes in mental disorders of infants and preschoolers and has evaluated over one hundred children under age five in the past ten years (T. 8, 12).

Dr. Luby diagnosed the twins with the Axis I mental disorder of Reactive Attachment Disorder ("RAD") (T. 23, 37). RAD can arise in young children with a very unstable environment early in life, particularly characterized by multiple placements (T. 23). Children with RAD fail to develop a normal healthy secure attachment to a single caregiver (T. 23). Failure to develop this attachment leads to difficulties in general and emotional development (T. 24).

In addition to the twins' history of multiple placements, they had other RAD symptoms (T. 95-96). These symptoms included indiscriminate social ability, a willingness to engage with strangers not appropriate to their age, being relatively apathetic and withdrawn regarding engaging in toys, as well as not demonstrating a level of attachment to their primary caretaker as would be expected from normally developing children (T. 95-96).

At the time of Dr. Luby's examinations of the twins in July and August, 2001, Dr. Luby stated the twins' RAD was in partial remission (T. 26-27). However, Dr. Luby testified it was unfair to say that because the RAD was in remission the twins could bounce back (T. 39). She stated the twins had multiple and serious risk factors (T. 39). Dr. Luby stated, even if the twins stayed in their current environment, their prognosis was still guarded, but they have a chance of some success (T. 40).

If the children were moved to another placement, Dr. Luby testified, based upon a reasonable degree of psychiatric certainty, the twins would suffer repeated behavioral and emotional problems as well as developmental problems (T. 39-40). Dr. Luby concluded that a movement in placement would be very detrimental, both developmentally and emotionally, to the twins (T. 39).

Dr. Luby further testified that the challenge and burden of parenting these premature twins with this Axis I mental disorder was exceedingly high (T. 37). The twins would require a lot of support as well as probable psychiatric and development intervention for quite some time (T. 40). The most important thing

for these twins with RAD was to have a stable reliable caregiver (T. 85). Appellant presented no witnesses to contradict Dr. Luby at the Jurisdictional hearing (T. 596). The Jurisdictional Order was never appealed.

At the Dispositional hearing, Appellant presented Jean Fischer, a Marriage and Family Therapist to testify about the twins' RAD (T. 602). Ms. Fischer is not a licensed medical doctor practicing psychiatry, she is not a licensed psychologist nor is she a licensed social worker (T. 641). The court did not find Ms. Fischer to be an expert relating to RAD, but allowed her to testify based on her limited training and education (T. 615-616). Ms. Fischer could not testify to a medical degree of certainty regarding the twins and RAD (T. 628-629). Instead, she testified to a "clinical" degree of certainty the twins did not have RAD (T. 628-629).

Ms. Fischer based her conclusion on the fact that she did not think the twins demonstrated symptoms of RAD on a consistent basis (T. 629). Ms. Fischer never saw the twins (T. 634-635). Ms. Fischer said she based her conclusions on the twins' history and that knowing their history was critical (T. 635-636). Ms. Fischer admitted she read the thirty-five page report concerning the twins' history only ten minutes before testifying and had only seen the first few pages (T. 635-636). She read Dr. Luby's report the day before she testified (T. 691). Ms. Fischer also stated she had never heard of remission in the context of RAD (T. 672). The DSM-IV states "considerable improvement or remission may occur if an appropriately supportive environment is provided" (T. 672).

Ms. Fischer further testified, based on the fact the twins had multiple moves in the first two years of life, she would recommend they seek attachment therapy (T. 694, 695). Ms. Fischer admitted it was very important for a child with Attachment Disorder to have stability with the same caretaker and they need structure and consistency (T. 645, 705)

Dr. Dean L. Rosen also testified for Appellant that the twins did not have RAD (T. 920-922). Dr. Rosen is not a specialist in the mental health of children under age two (T. 929). Dr. Rosen admitted his experience is mostly in the area of evaluating parents and parenting (T. 928-929). In fact, Dr. Rosen admitted he had never done an evaluation of a child under age two (T. 928). Further, Dr. Rosen's saw the twins eight months after Dr. Luby, and he did not read any of the twins' history prior to observing them (T. 945, 982).

Appellant's final witness, Dr. Cuneo, was a clinical psychologist and also the father of one of the law students working on Appellant's case (T. 1073). He saw the twins for one hour on February 19, 2002 in Dr. Rosen's office (T. 1078-79). He testified he did not see any signs of RAD in that one hour observation (T. 1098). He admitted the Washington University School of Medicine Psychiatric Department was reputable and good (T. 1105).

The court's findings at Jurisdiction that it was in the twins' best interest to remain in custody

On March 22, 2002, the lower court entered its Findings and Judgment of Jurisdiction ("Jurisdictional Order") after a hearing on the Juvenile Officer's

Petition pursuant to 211. 031 RSMo.. (L.F. 112; A.App. 10). The court found it was in the twins' best interest to remain in protective custody (L.F. 112; A.App. 10). The court further found the twins were without proper care, custody or support and delivery of the twins to Appellant's custody was contrary to their welfare (L.F. 112). Appellant did not put on any witnesses at the jurisdictional hearing (T. 596). The Jurisdictional Order was never appealed.

The court's Jurisdictional Order also found the following:

1. Dr. Joan Luby, attending psychiatrist, Washington University School of Medicine Child and Adolescent Psychiatry Clinic, diagnosed the twins with Reactive Attachment Disorder in partial remission as the result of the repeated and early disruptions of care-giving relationships (L.F. 119; A.App. 17). The psychiatrist warned another change in caregivers may further adversely affect the twins' emotional and psychological development (L.F. 119; A.App. 17).
2. Appellant's actions "have caused the twins to be subject to numerous unstable, inappropriate, temporary placements, including, but not limited to placements in California, Arkansas, and Great Britain, within a span of a few months. The number and nature of said placements have not been in the best interest of the twins." (L.F. 118; A.App. 16).
3. On numerous occasions, prior to the birth of the twins, and after the Juvenile Officer filed the petition for jurisdiction, Appellant expressed a

desire to consent to the adoption of the twins, only to change her mind later (L.F. 119; A.App. 17).

4. Appellant was unable to provide the twins with the proper care necessary for the twins' well-being (L.F. 119; A.App. 17).
5. Appellant "is an unfit mother in that she:
    a) has exploited the twins for purposes of personal gains in that she:
        1. Accepted gifts, unrelated to reasonable adoption expenses from two perspective adoptive couples; including diamond earrings, hair braiding, hotel expenses; Christmas gifts, clothes and toys for her other children (L.F. 119; A.App. 17);
        2. Claimed that the twins were in her care when they were not, in order to qualify for greater public assistance benefits for herself (L.F. 119; A.App. 17);
    b) failed to provide the twins with adequate medical care in that she failed to (L.F. 119; A.App. 17):
        1. Take prescribed medication while pregnant to prevent pre-term labor and the twins were born three months premature (L.F. 120);
        2. Take the twins to medical appointments as recommended by the twins' physician (L.F. 120; A.App. 18);
    c) overwhelmed and highly stressed with birth of twins" (L.F. 119-120; A.App. 17-18).

The Jurisdictional Order also specifically cited the chronological events of Appellant placing the twins with the Allens, removing the twins from the Allens and signing a consent to have the twins adopted by the Kilshaws (L.F. 116; A.App. 14). The Order further cites that the Arkansas court, based on Appellant's consent, granted the Kilshaws' adoption petition. The Kilshaws took the twins to the U.K., the children came into care in the U.K., and the Arkansas court set aside the adoption for lack of jurisdiction (L.F. 116-117; A.App. 14-15).

The court's findings at Disposition that return of the twins to Appellant was contrary to their welfare

Two months after its Jurisdictional Order, on May 22, 2002, after hearing numerous witnesses on the issue of Disposition, the court, entered its Findings and Judgment of Disposition ("Dispositional Order"), granting legal custody of the twins to the Missouri Division of Family Services for appropriate placement (L.F. 122, 124; A.App. 120, 122). The court found return of the twins to Appellant was contrary to their welfare (L.F. 123; A.App. 21).

The court also found DFS was not required to engage in any further reasonable efforts to reunite the twins with Appellant, and visitation between the twins and Appellant was not in their best interests as it "will impair the emotional development of the twins." (L.F. 124; A.App. 22). While Appellant filed a notice of appeal with respect to the Dispositional Order, she never followed through with that appeal. The Missouri Court of Appeals, Eastern District, dismissed her appeal for failure to provide the record on appeal (R. Supp.L.F. 1-10; R.App. 73).

Accordingly, the unappealed Dispositional Order made numerous findings of fact and conclusions of law, including the following:

1. Appellant's actions caused the twins to be subject to numerous unstable, inappropriate, temporary placements, including, but not limited to, placements in California, Arkansas, and Great Britain, within a few months (L.F. 131; A.App. 29). The court also found the number and nature of the placements was not in the twins' best interests and caused emotional harm to the twins (L.F. 131).
2. Appellant violated Section 453.110 RSMo. and Appellant stipulated to this violation (L.F. 130-131, 144; A.App. 28-29, 42).
3. Appellant perpetrated fraud in connection with the adoption of the twins to the Kilshaws in the Arkansas Court (L.F. 149; A.App. 47).
4. Appellant had subjected the twins to severe or recurrent acts of emotional abuse pursuant to Section 211.183.7 RSMo. The court states that this finding is based on all the evidence in the case, including but not limited to: multiple placements of the twins and the resulting instability; the findings of Dr. Luby; the indecisiveness of Appellant; the lack of family support to Appellant; and the admissions against interest by Appellant (L.F. 148; A.App. 46).
5. Since the return of the twins no family members have expressed interest in the adoption or care of the twins (L.F. 149; A.App. 47); Appellant has expressed her wish that the twins be adopted and

remain with the foster parents; Appellant has since changed her mind but offered no viable alternatives to the Court; and Appellant's family has failed to support Appellant. The court also finds the first efforts by Appellant's family to intervene in the matter was by the maternal grandmother, Ms. Gunn, in a Motion to Intervene during the course of the court's hearing (L.F. 149; A.App. 47).

6. The twins have been in the custody of Missouri DFS for over one year, had previously been in custody of the U.K. Court for three months and thus, for the past fifteen months the twins had been in protective custody (L.F. 149; A.App. 47).

7. The twins were in Appellant's sole care, custody and control only fifty days since their birth and there was little effort, if any, at bonding and attachment by Appellant with the twins and none exists (L.F. 132, 149; A.App. 130, 147).

8. The guiding legal principal for the Court is the best interests and welfare of the twins pursuant to Section 211.011 RSMo. (L.F. 150).

9. Appellant's actions and faulty decision-making showed an inability to properly care for the twins (L.F. 150; A.App. 148).

10. Appellant's actions regarding adoption of the twins throughout her pregnancy, at birth, after birth and throughout the twins' placement for adoption have negatively impacted the emotional development and best interests and welfare of the twins (L.F. 150; A.App. 48).

11. Since the court has asserted its jurisdiction over the twins Appellant has continued to vacillate concerning the adoption of the twins (L.F. 150-151; A.App. 48-49).

12. "The Court has no faith that Mother is capable of taking care of the twins or that she has sufficient family support to aid her." The court stated it has no confidence, at this late hour, after the twins have spent practically their entire lives in the custody of caregivers outside of Mother and family, that Appellant and family would now be able to step forward and properly care for the twins (L.F. 151).

13. The twins need the stability they have finally achieved through DFS and the foster parents and the best circumstances for the future of the twins is the stability with the foster parents (L.F. 151; A.App. 49).

14. DFS made reasonable efforts toward reunification with Appellant (L.F. 148). No additional preventive or reunification efforts by DFS could have prevented or shortened the twins' separation from the family (L.F. 150; A.App. 48).

15. The total circumstances negate any further reasonable efforts at reunification and, any further efforts at reunification would be harmful to the emotional development of the twins and not in the best interests and welfare of the twins (L.F. 150, 151). The court acknowledges the seriousness of its decision and recognizes the preference and need of children to be with their natural parents, but

states the circumstances of this case justifies forfeiture of parental rights (L.F. 150; A.App. 48).

In its Dispositional Order, the court cites numerous pieces of evidence it heard and on which it based its findings. The court specifically pointed out testimony from Dr.Luby, Child Psychiatrist, and an expert in mental disorders of preschoolers (L.F. 132; A.App. 30). The court cites that Dr. Luby found the twins suffered from Reactive Detachment Disorder in partial remission, a major mental disorder. (L.F. 132). The court cited Dr. Luby's finding, within a reasonable degree of psychiatric certainty, that the multiple placements have negatively impacted the twins and the lack of stability has been detrimental to their emotional and behavioral development (L.F. 132). The court cited Dr. Luby's testimony that the twins were doing well with the foster parents and it would be harmful to move them (L.F. 133; A.App. 31). The court specifically found the testimony of Dr. Luby to be credible and found her testimony showed the twins had suffered emotional harm (L.F. 133).

The court also cites testimony from Appellant's witnesses on Disposition including that of Jean Fischer, Dean Rosen and Daniel Cuneo who testified the twins did not have RAD (L.F. 133; A.App. 31). Directly thereafter, the court stated, for a second time, that "The Court finds Dr. Luby's testimony to be credible and believable" (L.F. 133; A.App. 31). Then the court finds that Dr. Luby observed the twins in the summer of 2001, shortly after their return from the U.K. and the other witnesses did not observe the twins until early Spring 2002,

when the twins had been in Missouri for nearly one year (L.F. 133). The court found, "it stands to reason that the multiple placements and the lack of stability would have a negative impact on the twins" (L.F. 133). The court stated that it appeared, based upon the observations of Appellant's experts and Dr. Luby's diagnosis of the moderate disorder in remission, that the twins have been progressing well and are blossoming in their current environment (L.F. 133; A.App. 31).

The Dispositional Order also recounts the facts of Appellant's placement of the twins with the Allens, and the Kilshaws and how Appellant drove with her other daughter, the twins and the Kilshaws from California to St. Louis via Mexico, being stopped by the police for speeding in Kansas (L.F. 128; A.App. 26). The court also cites evidence of Appellant's consent for the Kilshaws to adopt in Arkansas and the Arkansas adoption was based on that consent (L.F. 128-129; A.App. 26-27).

The court found the testimony of Sandra Bates, DFS Child Abuse Investigator, and Dan Stewart, Criminal Investigator, credible, and evidence of emotional harm to the twins (L.F. 133-134). The court set out Ms. Bates' testimony Appellant wanted to have the twins adopted four months before their birth, and after their birth, and Appellant had considered couples in Oklahoma, New York, Kansas, California and the U.K. (L.F. 133-134; A.App. 31-32). The court set out Appellant's admissions she did not want to keep the twins and had contacted various places for the purposes of adoption (L.F. 134).

The court also found the testimony of Ms. Sippy, DFS Social Service Worker, presented credible evidence showing emotional harm to the twins (L.F. 134-136; A.App. 32-33). The court found Ms. Sippy spoke with Appellant about adoption of the twins six times in June and July of 2001 (L.F. 134). The Order found Ms. Sippy arranged for a meeting between Appellant and the foster parents at Appellant's request and Appellant was not opposed to the foster family adopting, as she was not sure she could take care of the twins, along with her three other children (L.F. 134-135). The Order also found Appellant did not wish to reunify and was interested in termination of her parental rights and that, on August 9, 2001, Appellant changed her mind and wanted the twins back (L.F. 135).

The court also cited testimony of Ms. Sippy that she arranged for four family support team meetings regarding the twins (L.F. 135; A.App. 33). The Order finds that, while a family member may have attended a meeting, no family members of Appellant came forward to be involved with the process or the adoption of the twins (L.F. 135). At one meeting it was even emphasized relatives needed to be involved (L.F. 135).

The Order further cites as credible testimony by Ms. Sippy, that Appellant's two older boys resided with Eula Gunn, Appellant's mother (L.F. 135). The Order further cites that, in conversations on June 4, June 5 and June 21, 2001, Ms. Gunn told Ms. Sippy she had no interest in adopting the twins and would not pursue placement of the twins with the family and she felt the twins

were bonded with the foster family (L.F. 135-136). The Order also finds Ms. Gunn said Appellant was not capable of handling the twins (L.F. 136; A.App. 34).

The court further cites testimony of Ms. Gunn that J.G. had resided with her on and off throughout his life, and both boys have lived with her since August of 2000 (L.F. 138). In addition, the court cites Appellant's mother's statement Appellant "did not want any family members to adopt the twins and that Mother has a mind of her own" (L.F. 138).

The court also found the testimony of Kristie Carter, DFS Investigator, to be credible and to show that the twins suffered emotional harm (L.F. 138). The Order states Ms. Carter met with Appellant's mother, Ms. Gunn, on June 4, 2001 and Ms. Gunn told her she would not take the twins, did not want to adopt the twins, and would make no request for the twins. Ms. Gunn further stated no other relatives were interested in the twins (L.F. 138; A.App. 36).

The Order also cited testimony from Dr. Susan Randich, Clinical Psychologist, that Appellant was overwhelmed with the care of the twins and Appellant was under a lot of stress and lacked support from her family (L.F. 139). The Order also cited Dr. Randich's testimony Appellant was easily influenced by others, made poor decisions and was often changing her mind (L.F. 139). The court cited testimony of Dr. Randich that the first two years are extremely important in the bonding process of a child, and it was not in the best interest of the twins for Appellant to take so long to decide their future (L.F. 139). The Order also cited testimony by Dr. Randich that it was not clear whether Appellant was

willing to parent the twins, and she had concerns about returning the twins to Appellant (L.F. 139; A.App. 37).

The court cited the following testimony by Appellant: that she was fine with her decision for the twins to be adopted until the media publicity in January 2001, that Appellant stopped taking her medication when pregnant with the twins, that she missed doctor appointments due to the added stress of the twins, that the Allens gave her diamond earrings valued at $100.00, that she pled guilty to Federal Welfare Fraud charges, and that she said she committed half of the crimes charged (L.F. 141; A.App. 39).

The court cited Appellant's admission that she knew the adoption by the Kilshaws in Arkansas should have taken place in Missouri – and she blamed the judge for messing up (L.F. 142). The court further cited Appellant's admission the twins had been in her sole custody for only fifty-two days since their birth (L.F. 142). The court cited Appellant admitted the twins were harmed by the multiple placements (L.F. 142; A.App. 40).

The court cited that Appellant admitted meeting with the foster parents about adoption, but changed her mind and the court also cited that Appellant assured the court she would not give up the twins again, the stress was gone, she had a stable relationship, a stable family, and a good job (L.F. 142). The court further cited testimony of Appellant's sister, who said Appellant was under the same stresses today as she had been before (L.F. 142; A.App. 40).

The road to termination of appellant's parental right

The first DFS Case Plan and Evaluation, dated April 27, 2001, listed reunification as the case goal (A.App.147, T. 401). That document also says, if reunification cannot occur, TPR and adoption is the plan (A.App.151, 152, T. 401-402). Ms. Sippy explained DFS was engaged in concurrent planning, a process where termination is the back-up plan if reunification does not occur (T. 399-402).

As early as August 7, 2001, the plan had changed. The DFS Social Summary of that date no longer recommends reunification but recommends Appellant and Father voluntarily consent to terminate their parental rights as termination of parental rights and adoption was in the best interest of the twins (R.App. 237, 262). A copy of that document was provided to Appellant's counsel (R.App. 263). That Social Summary further states Appellant has shown a great deal of indecision and inconsistency in regards to her feelings about whether or not she wants the twins (R.App. 251). It also says Appellant did not comprehend the harm done to the twins and referred to the twins' time away from her as a "vacation" (R.App.251).

In the Social Summary dated August 7, 2001, there was a list of things Appellant needed to do before any consideration would be given to returning the twins to her (R.App.237). Those things included completing a parenting training program, submiting to a psychological evaluation, visiting the twins regularly and financially support the twins (A. 237).

Prior to the hearings on Jurisdiction and Disposition, Appellant had done the things DFS requested (T. 379-381). However, simply because a parent completes everything on the list given by DFS, DFS policy does not guarantee custody (T. 437). Sometimes, even though parents complete everything asked, DFS may still decide placement with the parent would not be in the child's best interest (T. 437).

At the Dispositional hearing, DFS recommended the twins remain in DFS care, and DFS be allowed to initiate a Termination of Parental Rights Referral (T. 1353-54). The Termination of Parental Rights Referral is the process where the DFS worker submits a referral to the Juvenile Court, precipitating the termination of parental rights (T. 402).

Immediately after its Dispositional hearing, the court proceeded to a Permanency Planning hearing on April 23, 2002 (L.F. 153). The evidence from the Dispositional and Jurisdictional hearings was admitted at this hearing, pursuant to stipulation by the parties (L.F. 153). At that Permanency Planning hearing, the court repeated many of its previous findings, including that reasonable efforts were not required of DFS to effect delivery of twins to Appellant, and that Appellant's visitation with the twins was not in the best interest of the twins and would impair their emotional development (L.F. 154). The court found Appellant had a minimal relationship with the twins (L.F. 156; A.App. 54).

The court also found the permanent plan which served the best interest of the twins was termination of parental rights (L.F. 155). At that time it ordered a

Petition for the Termination of Parental Rights of Appellant and Father to be filed no later than July 19, 2002 (L.F. 158; A.App. 56).

The Juvenile Officer made a motion for extension of time to file the Termination of Parental Rights Petition due to the complexities of the case and an extension was granted up to September 6, 2002 (L.F. 82; A.App. 90). On September 4, 2002, the Juvenile Officer filed a Petition to Terminate Parental Rights of Appellant and Father (L.F. 105). A hearing was held on that Petition on November 20, 2002 (L.F. 103; A.App. 101). The court issued Findings, Conclusions and Judgment Terminating Parental Rights ("Termination Judgment") of both Appellant and Father on December 12, 2002.

Points Relied On With Authority

I. The trial court did not err when it terminated Appellant's parental rights because there was no error of law and the evidence supported the findings.

A. Standard of review in Termination of Parental Rights cases.

In the Interest of M.E.W., 729 S.W.2d 194 (Mo. banc 1987)

In the Interest of J.M., 815 S.W.2d 97, 101 (Mo.App. 1991

In the Interest of E.L.B., 103 S.W.3d 774 (Mo. banc 2003)

B. Appellant fails to preserve constitutionality issues for appellate review.

Fahy v. Dresser Industries, Inc., 740 S.W.2d 635 (Mo. banc 1987)

C. Appellant does not contest the twins were in foster care fifteen of the most recent twenty-two months.

In Interest of M.J., 66 S.W.3d 745 (Mo. App. 2001)

In the Interest of C.N.W., 26 S.W.3d 386 (Mo.App. 2000)

D. The Juvenile Officer further adopts the brief of the Division of Family Services regarding this Point and the constitutionality of Sections 211.447.2(1) and 453.110 RSMo.

II. The evidence supports the three statutory grounds terminating Appellant's Parental Rights, pursuant to Section 211.447.4 RSMo.

A. The evidence supports termination of parental rights because Appellant subjected the twins to a severe act and recurrent acts of emotional abuse, pursuant to Section 211.447.4(2) RSMo.

1. **The prior Dispositional Order found severe and recurrent acts of abuse; thus, no further finding was necessary for termination.**

   In the Interest of L.G., 764 S.W.2d 89 (Mo. banc 1989)

   In the Interest of L.M., 807 S.W.2d 195 (Mo.App. 1991)

2. **The severe and recurrent acts of abuse encompassed far more than simply putting the twins up for adoption.**

3. **The twins suffered severe and recurrent emotional abuse as found by a credible expert at the previous hearings.**

   In the Interest of P.C., 62 S.W. 3d 600 (Mo.App.2001)

4. **Appellant still fails to acknowledge the harm her actions caused and continues placing her needs above those of her children.**

   In the Interest of T.G. 965 S.W.2d 236 (Mo.App. 1998)

B. The trial court's finding the conditions that brought the twins into care continued to exist, pursuant to Section 211.447.4(3), was supported by clear, cogent and convincing evidence.

1. **The court made sufficient findings on the required factors in Section 211.447.4(3) RSMo.**

   In the Interest of R.L.K., 957 S.W.2d 778 (Mo.App. 1997)

   In the Interest of N.M.J., 24 S.W. 3d 771, 781-782 (Mo. App. 2000)

a. The court found DFS made reasonable efforts toward reunification and no further efforts were warranted.

b. The court considered and made findings on the other required factors.

In the Interest of T.A.S., 32 S.W.3d 804 (Mo.App. 2000)

In Interest of A.S.O., 52 S.W.3d 59 (Mo.App. 2001)

2. The evidence supports the court's finding that the conditions which brought these children into care, or conditions of a harmful nature, continued to exist.

a. The evidence supports that Appellant's continued stress, being overwhelmed, indecisiveness, and lack of family support, conditions that brought the twins into care and were harmful, continued to exist.

L.M., 807 S.W.2d 195 (Mo.App.1991)

b. Appellant fails to contest that the conditions that brought these children into care, or conditions of a harmful nature, continue to exist.

i. The twins' RAD diagnosis was made in the unappealed Jurisdictional and Dispositional Orders and was supported by the evidence.

In the Interest of L.G., 764 S.W.2d 89 (Mo. banc 1989)

In the Interest of M.E.W., 729 S.W.2d 194 (Mo. banc 1987)

ii. Appellant's psychological showed no mental illness, but showed numerous other problems regarding her ability to care for the twins.

C. Clear, cogent and convincing evidence supports the finding Appellant was unfit to be a party to the parent and child relationship, pursuant to Section 211.447.4(6) RSMo.

1. **Cumulatively, the evidence showed Appellant's unfitness to parent the twins.**
2. **Appellant would be overwhelmed with stress, *again,* if the twins were returned to her; thus she is unfit.**

III. The trial court did not abuse its discretion when it found that termination of Appellant's parental rights was in the twins' best interest; further, the court made findings, supported by the evidence, on the appropriate and applicable factors in Section 211.447.6 RSMo.

A. The trial court did not abuse its discretion when it found termination of Appellant's parental rights was in the twins' best interest.

In Interest of M.J., 66 S.W.3d 745 (Mo. App. 2001)

In the Interest of A.M.W., 64 S.W.3d 899 (Mo.App. 2002)

B. The trial court made findings on the appropriate and applicable factors in Section 211.447.6 RSMo.

In the Interest of C.N.W., 26 S.W.3d 386 (Mo.App. 2000)

In the Interest of K.C.M., 85 S.W.3d 682 (Mo.App. 2002)

C. The trial court did not err when it made findings as to Section 211.447.6 subsections (2)-(5) RSMo.

1. **The court made findings regarding the extent of Appellant's visitation, pursuant to Section 211.447.6(2) RSMo.**
2. **The court made findings regarding Appellant's payment of support, pursuant to 211.447.6(3) RSMo.**
3. **The court made findings that additional services would not enable return of the twins to Appellant within an ascertainable period of time, pursuant to Section 211.447.6(4) RSMo.**
4. **The court made findings Appellant showed a lack of commitment to the twins, pursuant to Section 211.447.6(5) RSMo.**

D. The evidence supports the trial court's findings regarding Section 211.447.6(1) and (7) RSMo.

1. **The evidence supports the court's finding the twins had no emotional ties to Appellant, pursuant to Section 211.447.6(1) RSMo.**
2. **The evidence supports the court's finding Appellant subjected the twins to a substantial and real risk of mental harm, pursuant to Section 211.447.6(7) RSMo.**

ARGUMENT

I. The trial court did not err when it terminated Appellant's parental rights because there was no error of law and the evidence supported the findings.

A. Standard of review in Termination of Parental Rights cases.

The judgment of the trial court should be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless the trial court erroneously declared or applied the law. In the Interest of M.E.W., 729 S.W.2d 194, 195-196 (Mo. banc 1987); In the Interest of J.M., 815 S.W.2d 97, 101 (Mo.App. 1991); In the Interest of A.S., 38 S.W.3d 478, 481 (Mo.App. 2001).

When the trial court has received conflicting evidence, appellate courts should review the facts in the light most favorable to the trial court's ruling. M.E.W. at 196; In Interest of J.L.M., 64 S.W.3d 923, 924-925 (Mo.App.2002). Evidence in the record that might support another conclusion does not necessarily establish that the trial court's decision is against the weight of the evidence. A.S. at 481.

The appellate court should also defer to a juvenile court's ability to determine the witnesses' credibility and to choose between conflicting evidence. M.E.W. at 195-196. A.S., at 481. The trial court is in a superior position to judge the credibility of witnesses and is free to believe all, part, or none of the witnesses testimony. J.L.M. at 924.

The Supreme Court of Missouri recently affirmed that "satisfaction of one statutory ground for termination is sufficient to terminate parental rights if termination is in the child's best interest." In the Interest of E.L.B., 103 S.W.3d 774, 776 (Mo. banc 2003) (citing In re A.S., 38 S.W.3d 478, 482 (Mo. App. 2001). In re C.W., 64 S.W.3d 321, 324 (Mo. App. 2001)). In E.L.B. the court found there was sufficient evidence to support termination on one of the grounds in Section 211.447 so it did not address Appellant's other allegations of error. Id.

In this case the court found four different grounds on which to terminate Appellant's parental rights, all of which were supported by the evidence, to wit:

1) the twins were in foster care fifteen of the most recent twenty-two months, pursuant to Section 211.447.2(1) RSMo.;
2) Appellant's actions caused a severe act or recurrent acts of abuse, pursuant to Section 211.447.4(2) RSMo.;
3) Appellant failed to rectify the conditions that brought the twins into care or conditions of a harmful nature continue to exist, pursuant to Section 211.447.4(3) RSMo.; and
4) Mother was unfit to be a party to the parent-child relationship, pursuant to Section 211.447.4(6) RSMo.

All four grounds were supported by the evidence and the court did not erroneously declare or apply the law. Thus, the trial court's Findings, Conclusions and Judgment Terminating Parental Rights ("Termination Judgment") should be affirmed.

B. Appellant fails to preserve constitutionality issues for appellate review.

The law, as made by this Court, is clear. Constitutionality must be raised at the first opportunity. Fahy v. Dresser Industries, Inc., 740 S.W.2d 635, 639 (Mo. banc 1987); S.L.J. v. R.J., 778 S.W.2d 239, 242 (Mo.App. 1989); In Interest of R.H.S., 737 S.W.2d 227, 233 (Mo.App. 1987); Lewis v. Dept. of Social Services, 61 S.W.3d 248, 254 (Mo.App. 2001). Appellant failed to raise any constitutionality issue in her answer to the petition for termination of her parental rights filed on November 9, 2002 (L.F. 88-89). Further, Appellant failed to raise any constitutionality issue anywhere else during the process, including the hearing concerning the termination of her parental rights (L.F. 88-89, 103-162; T.1886-1938).

The first time Appellant raises the issue of the constitutionality of terminating parental rights under Section 211.447.2(1) when the child is in foster care fifteen of the most recent twenty-two months is in her Motion to Transfer filed with this Court (R.App. 418). The issue of the constitutionality of Section 453.110 RSMo is not raised until even later, in a Motion to Increase Time Alloted for Oral Argument before this Court (R.App. 423). This is too late to preserve any constitutional issue for review.

C. Appellant does not contest that the twins were in foster care fifteen of the most recent twenty-two months.

Appellant does not contest that these children were in foster care fifteen of the most recent twenty-two months. *Section 211.447.2(1) RSMo*. Missouri Court's have repeatedly held that when a child has been in foster care fifteen out of the past twenty-two months, this ground alone is enough to terminate parental rights, if it is in the child's best interest. In Interest of M.J., 66 S.W.3d 745, 748 (Mo. App. 2001); In the Interest of C.N.W., 26 S.W.3d 386, 394 (Mo.App. 2000); In the Interest of A.D.R., 26 S.W.3d 364, 369 (Mo.App. 2000). Thus, because Appellant fails to raise the constitutionality of the statute until appeal and because, in any event, the statute is constitutional (see below), the reviewing court need only decide if the trial court abused its discretion in deciding termination of parental rights was in the best interest of the children. The trial court did not abuse its discretion.

Appellant erroneously argues the Juvenile Officer deliberately delayed filing the termination petition so the twins would be in foster care fifteen of the most recent twenty-two months. This argument fails on its face. Prior to the filing of the termination petition, in its Judgment and Findings of Disposition ("Dispositional Order") the court had already found the twins had been in foster care for fifteen months (L.F. 149; A.App. 47). The court found the twins had been in foster care for one year in Missouri and for at least three months in the United Kingdom (A.App. 47). Appellant never appealed this finding.

Further, the court ordered the Juvenile Officer to file a petition on the matter by July 19, 2002 (A.App. 56). The twins were placed in alternative care in Missouri on April 18, 2001 (L.F. 151; A.App. 49). Thus, by July 19, 2002, the twins would already have been in foster care in Missouri for fifteen months. The Juvenile Officer's Motion for Extension of Time to File her petition did not create the ground.

Further, the Attorney for the Juvenile Officer's reasons for requesting an extension of time were valid. The Attorney for the Juvenile Officer argued the case was complex, her current caseload was heavy and she was not involved in this complex case prior to that time and, thus, needed additional time to review all of the material (A. App. 90). The Attorney for the Juvenile Officer who filed the Petition to Terminate Parental Rights, Donna Head, was not the same Attorney for the Juvenile Officer who tried the case at Jurisdiction and Disposition, Susan Guerra. Thus, it is not surprising she would need more time to review all of the information before she could file a petition (T. 2, 1881). There is no evidence to show any ulterior motive by the Juvenile Officer.

Finally, Appellant did nothing to try to move the case faster to avoid the twins being in care for fifteen months. In fact, almost twelve months went by before the Jurisdictional and Dispositional hearings were held in this matter. This was due to the complexity of the case and the fact the investigation encompassed various states and countries, including California, Arkansas and the United Kingdom. However, there is no mention anywhere in the numerous motions and

orders in the file of Appellant attempting to speed up the process. Appellant knew, from as early as August 7, 2001, less than four months after the twins returned to Missouri, that DFS was recommending termination of Appellant's parental rights and adoption as in the best interest of the twins (R. App. 237, 262-263). Despite the knowledge DFS was recommending termination, the record never reflects any objection by Appellant of the time lapse until Appellant objected to the Juvenile Officer's Motion for Extension of Time to File her Petition to Terminate Parental Rights. By then, as stated above, it was too late.

D. The Juvenile Officer further adopts the brief of the Division of Family Services regarding this Point and the constitutionality of Sections 211.447.2(1) and 453.110 RSMo.

In addition to the above arguments, the Juvenile Officer adopts the brief of the Division of Family Services regarding this Point and the constitutionality of Sections 211.447.2(1) and Section 453.110 RSMo.

II. The evidence supports the three statutory grounds terminating Appellant's Parental Rights, pursuant to Section 211.447.4 RSMo.

A. The evidence supports termination of parental rights because Appellant subjected the twins to a severe act and recurrent acts of emotional abuse, pursuant to Section 211.447.4(2) RSMo.

1. The prior Dispositional Order found severe and recurrent acts of abuse; thus, no further finding was necessary for termination.

The court terminated Appellant's parental rights finding her actions subjected the twins to severe and recurrent acts of emotional abuse, pursuant to Section 211.447.4(2) RSMo. (L.F. 106; A.App. 104). In its prior Dispositional Order, the court made the identical finding, that Appellant had subjected the twins to severe or recurrent acts of abuse (L.F. 148). The court incorporated its Dispositional Order into its Termination Judgment (L.F. 126). Appellant filed a notice of appeal regarding the Dispositional Order, but the appeal was dismissed because Appellant failed to file the record on appeal (R.Supp.L.F. 1-10; R.App. 68-73). Thus, Appellant cannot now argue that finding was in error.

Further, at the termination hearing, the court took judicial notice of its file and specifically of its findings in the Dispositional Order that Appellant "subjected the twins to severe or recurrent acts of emotional abuse" (T. 1883-1884). There was no objection to the court taking judicial notice (T. 1884). This alone is

enough to support a finding at termination that Appellant subjected the twins to a severe or recurrent act of emotional abuse pursuant to Section 211.447.4(2). In the Interest of L.G., 764 S.W.2d 89, 95(Mo. banc 1989); In the Interest of L.M., 807 S.W.2d 195 (Mo.App. 1991).[2]

The Missouri Supreme Court has found that the statute provides for termination based upon a single act that could also be used as a basis for the prior adjudication. L.G. at 95. The Court further found that, if the act of abuse is severe, a further showing at the termination proceeding is not necessary. Id.

In L.M. the court took judicial notice of its file. Id. Those files reflected that acts of physical abuse had occurred. Id. In that case, the appellate court stated that all the juvenile officer had to do was show the acts of abuse were severe Id. In the case at bar, the underlying file shows the abuse existed and that it was severe. Thus, no further showing is necessary for termination.

2. The severe and recurrent acts of abuse encompassed far more than simply putting the twins up for adoption.

Appellant's argument her rights were terminated only because she placed the twins for adoption drastically oversimplifies the court's findings and the facts of the case (A.B. 47). The trial court, in its Termination Judgment, found the

[2] In both of these cases the court refers to Section 211.447.2(2)(c) RSMo. 1984. This statute is identical to Section 211.447.4(2)(c) RSMo. 2000, at issue in this case, which was modified in 1997 (R.App. 4).

severe and recurrent acts of emotional abuse included the multiple, unstable and inappropriate temporary placements (L.F. 106). In the Dispositional Order, incorporated into the Termination Judgment, the court said it based the severe and recurrent acts of abuse finding on all the evidence in the case but not limited to: the multiple placements of the twins and resulting instability, the findings of Dr. Luby, the indecisiveness of Appellant, the lack of family support of Appellant, and the admissions against interests of Appellant (L.F. 126, 148; A.App. 124, 146).

In addition, Appellant's actions included much more than simply placing her children in adoptive homes and Appellant's actions led to diagnosable mental harm to the twins. Appellant quit taking her medication, because she did not want to be pregnant and didn't feel attractive, and the twins were born three months premature (T. 186, 1035, 1516-1517, L.F. 127). The twins were hospitalized for two months with numerous problems as a result of their premature birth (T. 112, 1517). Appellant took the twins to her mother's house, where three other children and three other adults were living; with Appellant's history of others caring for her children, it is uncertain who was caring for the twins (T. 1243, 1266-1268). Appellant missed the twins' first doctor's visit (T. 564-565; L.F. 128). After less than two months of caring for the twins, because Appellant allegedly had no other option, she took the twins to the Allens in California (T. 1267-68, 1541, L.F. 125). Just six weeks later, Appellant takes the twins from the Allens (T. 1477, 1555). Appellant's brief says she removes the twins from the Allens, because of Mr.

Allen's strange behavior regarding heirlooms and a single conversation with Ms. Allen where Appellant "felt" they might not go through with an open adoption (T. 1469-1470; A.B. 49). Appellant then subjects the twins to numerous days in a car driving back to St. Louis via Mexico (T. 1478-79, 1562). At that time, Appellant intends that the twins look to the Kilshaws as their primary caretakers (T. 1571, 1661-62). Less than two weeks later, Appellant leaves the twins with the Kilshaws with the understanding they would be adopted (L.F. 129). Appellant does not want the twins again until the media accuses her of selling them over the internet (T. 1485, 1595; A.B. 16).

3. The twins suffered severe and recurrent emotional abuse as found by a credible expert at the previous hearings.

The court found, in the unappealed Dispositional Order, that the actions of Appellant, and the subsequent instability of the twins, caused the twins to suffer from Reactive Attachment Disorder ("RAD"), a major mental disorder RAD (L.F. 107, 119; T. 23-24, 34-35). Emotional abuse can be established by testimony of lay witnesses or by an expert who deals in the diagnosis of emotional disorders. In the Interest of P.C., 62 S.W. 3d 600, 603 (Mo.App.2001). In this case, Dr. Luby, A psychiatrist at Washington University School of Medicine who specializes in mental disorders of infants and preschoolers, found the twins suffered from RAD, an Axis I mental disorder. Moreover, the court's Dispositional Order noted and found credible the testimony of Dr. Luby that the multiple placements and lack of stability of the twins were detrimental to the twins emotional and behavioral

development (L.F. 132-133). As a result of RAD these twins will suffer emotional, behavioral and developmental problems (T. 39-40). Further the twins will require a lot of support as well as probable psychiatric and development intervention for quite some time (T. 40).

4. Appellant still fails to acknowledge the harm her actions caused and continues placing her needs above those of her children.

Appellant argues she is simply an overstressed, single mother who had no help and put her children up for adoption. Appellant's failure to take responsibility for her behavior and failure to acknowledge the harm her actions caused the twins exemplifies Dr. Randich's finding that Appellant had little insight into her own behavior and motivations and little awareness of the consequences of her behavior on her children (T. 1040-41).

Appellant's actions also show her failure to take responsibility for her behavior and to acknowledge the consequences of her behavior on her children. When Appellant did not want to be pregnant because she "felt like a house" and "was so hot" she quit taking her medication and the twins were born premature (T. 1035, 1516-1517). When Appellant wanted to avoid a speeding ticket, she unnecessarily took one twin to the hospital (L.F. 128; T. 132-135, 1566). When Appellant had a "feeling" she might not get the phone calls and letters she wanted, she pulled the twins out of a pre-adoptive home (T. 1473). Appellant pulled the twins from this home even though she was talking to the pre-adoptive mother every day (T. 1553). Appellant chose the last pre-adoptive home for the twins on

the basis that she thought traveling to the U.K. would be a good experience, ***for her*** (T. 211). When Appellant was upset by the allegations she sold the twins on the internet, she wanted them back (T. 1595-1596). Originally Appellant did not want the twins to go with family members. Now, when she is upset about the allegations surrounding her, she wants her mother to get the twins (T. 1596). Appellant even told the media she was the victim in this case, because Father never supported her (T. 1676-1677). Appellant said she did not know if her children were victims (T. 1677).

A finding of abuse does not require evidence of purposeful intent to harm the children. In the Interest of T.G. 965 S.W.2d 236, 333 (Mo.App. 1998). Thus, it does not matter whether Appellant intended for the twins to be harmed by the actions she took – it only matters that they suffered an Axis I mental disorder as a result.

Appellant "reminds" the court that the twins originally came into custody because of allegations Appellant violated Section 453.110 RSMo., and not, Appellant argues, because she had committed abuse or neglect. Appellant fails to state that, while she stipulated to violating Section 453.110, the Juvenile Officer also filed a petition under Section 211.031 RSMo. The 211.031 petition alleged the twins were without proper care, custody and support (L.F. 44). The 211.031 petition, filed on April 18, 2001, the day the children returned to Missouri, also alleged the numerous placements were not in the twins' best interest, among other

things (L.F. 44). That is the petition upon which the aforementioned Jurisdictional and Dispositional Orders were based.

Appellant also cites a statistic from a report that the average number of placements for children in care of DFS was 3.14 (A.B. 51). Appellant then leaps to the conclusion, based solely on that statistic, that since DFS has not been found to have abused children by moving them, Appellant should not be either (A.B. 50-51). As mentioned above, Appellant's case is more complicated than simply placing a child for adoption. Moreover, this statistic, standing alone, fails to consider numerous variables. Many children enter DFS custody when they are older, after they have formed those initial attachments. Many children in DFS care go to temporary emergency placements before entering longer-term placements and many children move in and out of residential facilities because of behavioral problems.

Most importantly, however, in this case, Appellant's actions were found, in two unappealed court Orders, to have caused the twins emotional harm and to now suffer from a major mental disorder (L.F. 106-107). The court found these actions by Appellant continue to affect the twins to this day (L.F. 106-107). Appellant fails to cite any case where the actions of DFS harmed a child by repeated placements. If a child in DFS custody were to develop an Axis I mental condition because of the actions of DFS, they too should be found to have abused the child.

B. The trial court's finding that the conditions which brought the twins into care continued to exist, pursuant to Section 211.447.4(3), was supported by clear, cogent and convincing evidence.

1. The court made sufficient findings on the required factors in Section 211.447.4(3) RSMo.

The trial court terminated Appellant's parental rights because the conditions which brought the twins into care continued to exist or conditions of a harmful nature continued to exist, pursuant to Section 211.447.4(3) RSMo.. When terminating under this ground, the statute requires that the court consider and make findings on four factors. The factors are:

a) the extent of the parties progress in complying with a social service plan;

b) the success or failure of the efforts of DFS to aid the parent in adjusting her circumstances or conduct to provide a proper home for the child,

c) if the parent has a mental condition which renders the parent unable to provide for the child and

d) if the parent has a chemical dependency which prevents the parent from providing for the child *Section 211.447.4(3)(a-d) RSMo.*

There is no requirement as to "what the juvenile court must find regarding those factors in order to terminate." In the Interest of R.L.K., 957 S.W.2d 778, 782 (Mo.App. 1997. The purpose of Section 211.447.4(3) is simply to ensure the court is aware of and has properly considered the factors in deciding to terminate

parental rights. In the Interest of N.M.J., 24 S.W. 3d 771, 781-782 (Mo. App. 2000). Proof of one of these factors is sufficient for termination. N.M.J., at 781.

a. The court found DFS made reasonable efforts toward reunification and no further efforts were warranted.

In this case, the court's finding on the factor in Section 211.447.4(3)(b) regarding the success or failure of efforts by DFS to aid Appellant in adjusting her circumstances or conduct to provide a proper home for the child was sufficient for termination. The court specifically found that DFS made reasonable efforts toward reunification with Appellant (L.F. 148). The court further found that no additional preventive or reunification efforts by DFS could have prevented or shortened the twins' separation from the family (L.F. 150; A.App. 48).

The court also finds the total circumstances negate any further reasonable efforts at reunification with Appellant and, any further efforts at reunification would be harmful to the emotional development of the twins and not in the best interests and welfare of the twins (L.F. 150, 151). The court acknowledges the seriousness of its decision and recognizes the preference and need of children to be with their natural parents, but states that the circumstances of this case justifies forfeiture of parental rights (L.F. 150; A.App. 48). Thus the court made findings regarding the factor in Section 211.447.4(3)(b).

Moreover, the evidence supported the finding on this factor. By the time of the Dispositional Order, the twins had already been in care for one year (L.F. 149, 152; A.App. 47, 50). The evidence shows that DFS did make efforts at

reunification in that they conducted concurrent planning concerning the permanency placement of the twins (L.F. 148; A.App. 46). Concurrent planning is where the goal is reunification but a back up plan of termination of parental rights is followed in case reunification does not work (T. 395, 399-400, 402). The court notes that Appellant visited the twins regularly since their return to Missouri and that DFS has held Family Support Planning Meetings with the goal of reunification (L.F. 149). The court further stated that, despite these efforts, the court has no faith that Appellant is now capable of taking care of the twins or that she has sufficient family support to aid her (L.F. 151; A.App. 49).

b. The court considered and made findings on the other required factors.

Regarding the factors in Section 211.447.4(3)(a),(c) and (d), the court's Termination Judgment specifically found that the court considered these subsections. The court specifically stated that "the Court has considered all subsections of 211.447.4" (L.F. 109; A.App. 7). The court further stated that, "except as expressly provided herein, [the court] finds the subsections irrelevant because there was inadequate evidence of their applicability presented during the evidentiary hearing" (L.F. 109).

In fact, the other factors were not applicable to the court's decision to terminate Appellant's parental rights. Appellant did not have a mental illness or a chemical dependency, the factors in Section 211.447.4(3)(c) and (d). Thus, these factors were not relevant to the court's decision to terminate Appellant's parental

rights. The evidence also showed that Appellant did everything that DFS required in its Social Summary, perhaps considered the social service plan, so the factor in Section 211.447.4(3) also was not relevant to the court's decision to terminate Appellant's parental rights.

The court cited evidence regarding these issues in its Termination Judgment. The court noted Appellant received a psychological evaluation, visited the twins, participated in parenting classes and paid child support, as required of her by DFS (L.F. 136, 139-140; A.App. 34, 37-38). Further, the court referred to that psychological evaluation regarding Appellant's mental condition and there was no evidence of any chemical dependency of Appellant provided. Thus, the court considered evidence regarding the factors in Section 211.447.4(3)(a), (c) and (d) and found them inapplicable to its decision to Terminate Appellant's parental rights.

Missouri courts have held that when considering and making findings as to the four conditions specified in 211.447.4(3)(a-d) the court may state that the condition is irrelevant and state why it is irrelevant. In the Interest of T.A.S., 32 S.W.3d 804, 810 (Mo.App. 2000); In Interest Of A.S.O., 52 S.W.3d 59, 66 (Mo.App. 2001). In this case, the court clearly stated why the conditions were irrelevant - because no evidence of their applicability to termination of Appellant's parental rights was presented.

2. The evidence supports the court's finding that the conditions that brought these children into care, or conditions of a harmful nature, continued to exist.

The court's Termination Judgment found, "the conditions which caused this court to assume jurisdiction over "The Twins" or conditions of a potentially harmful nature continue to exist" (L.F. 106; A.App. 4). The court further found, pursuant to Section 211.447.4(3) that the conditions would not be remedied at an early date to permit return of the twins in the near future to Appellant and that, due to all the circumstances of the case, continuation of a relationship between Appellant and the twins greatly diminished the prospects of the twins for early integration into a stable and permanent home (L.F. 106).

The court proceeded to identify some of those conditions (L.F. 105-106; A.App. 3-4). Those conditions were the multiple placements of the twins during the first months of their lives and resulting instability; Appellant's continued stress and being overwhelmed with the reality of the twins; the continued indecisiveness of Appellant regarding the twins; the lack of family support for Appellant in caring for the twins (L.F. 107; A.App. 5).

Moreover, the twins had been under juvenile court jurisdiction for over one year at the time of the Dispositional Order. The court had already considered that conditions of a harmful nature existed at the time of the unappealed Dispositional Order, when it did not return the twins to appellant at that time (L.F. 105).

a. The evidence supports that Appellant's continued stress, being overwhelmed, indecisiveness, and lack of family support, conditions that brought the twins into care and were harmful, continued to exist.

Appellant testified that when she gave the twins up for adoption she was overwhelmed and felt she had no other option (T. 1459, 1490-1492, 1528-1529; L.F. 119-120, 139; A.App. 17-19, 37). That was after Appellant was at home with the twins for less than two months (T. 111, 1454). The evidence at Disposition, about one year after the twins were in care, showed Appellant's life was no different than it was when Appellant admitted she was overwhelmed with the twins. Appellant's sister testified that Appellant was still under the same stresses at the time of the Dispositional hearing (T. 142).

Appellant failed to produce evidence rebutting the juvenile officers' proof that nothing had changed since Appellant had been too overwhelmed to care for the twins. "Parents must make a commitment to change the course of their conduct which prevents the return of their children." L.M., 807 S.W.2d 195, 199 (Mo.App.1991).

At Disposition, when asked how her life was different now, Appellant testified that she now had a terrific job, a terrific guy and her family to back her up (L.F. 142; A.App. 40). The evidence showed that these things did not create a difference in Appellant's life. Appellant's "terrific" job was one she had only two months (T. 1606, 1617). Appellant testified she thought this job was stable (T.

1617). With Appellant's history of over 20 jobs, lasting from one day to three months, it is no wonder the trial court did not find this was a significant change from the time the twins came into care (R.App. 101).

In addition, Appellant's relationship with her boyfriend Mike Thompson did not constitute a significant change. Appellant and Mike had been dating for four months when the twins were born (T. 1739). In fact, Mike was at the hospital for their birth (T. 1748). In July 2001, when Appellant was considering voluntarily terminating her rights so the foster parents could adopt, Appellant told the foster parents her life had not changed since the birth of the twins except that she had Mike (T. 348). At that time, she and Mike had been dating over a year (T. 1739). Moreover, while Mike testified he planned to marry Appellant, he also admitted that their relationship "had its ups and downs" and they had been separated twice (T. 1755). Thus, the evidence did not support having Mike in her life was a significant change.

In its Dispositional Order, after the twins had been in care for over a year, the court found Appellant's lack of family support in caring for the twins "most disturbing"(L.F. 151; A.App. 49). The court further found it had "no confidence at this late hour after the twins have spent practically their entire lives in the custody of caregivers outside of [Appellant] and family…that [Appellant] and family would now be able to step forward and properly care for the twins" (L.F. 151).

This unappealed finding at Disposition is consistent with the evidence. The evidence showed that any support Appellant had from her family, she also had

when the twins were born. The evidence also showed Appellant refused this alleged support. Finally, the evidence showed that Appellant's family, while saying they supported her, failed to actually provide support when needed.

Appellant testified her mother offered to help her with the twins after they were born, but Appellant refused the offer (T. 1530-31). Appellant further stated that her mother helped with the boys, but the girls were for her to "deal with" (T. 1458). Finally Appellant admitted she was not getting much support from her mother, who did not really want her in the house (T. 1036).

Appellant's sister, Ms. Conley, testified that all of Appellant's relatives were supportive of her when the twins were born (T. 1682-84). However, Ms. Conley did not learn about the twins' adoption situation until everyone else, from the media (T. 1681). Appellant's cousin Patricia McKinnis said she would have adopted the twins, but Appellant never told her about the adoption either (T. 1528). Appellant also admitted that another cousin and aunt had offered to help and even to take the twins, but Appellant did not talk to them either (T. 1004, 1010-11, 1529).

While Appellant had numerous relatives testify about how supportive they were of her and how they would help, not one of them contacted DFS during the entire year the twins were in care prior to the Dispositional hearing (T. 397, 423). No one stepped forward to say they would help care for these babies.

Ms. Gunn called the DFS worker and talked about having the twins placed with her, but in the same phone conversation, she changed her mind (T. 1247-

1249). Ms. Gunn told the DFS worker she did not want to disturb the bond the twins had with the foster parents (T. 1247-1249). The twins had been with the foster parents for only six weeks at the time (T. 1248). Ms. Gunn said she was just throwing out the idea of adoption in the phone call and did not really want to pursue adoption (T. 424).

Throughout the time the twins were in care, Ms. Gunn had the phone numbers of numerous DFS workers, but she never contacted any of them again regarding adoption (T. 1250). Ms. Gunn did however, five days before the Jurisdictional hearing, nearly two full years after the twins were placed with their foster family, file a Motion to Intervene (L.F. 70, T. 2). The court denied the Motion.

Further, Dr. Randich testified that Appellant felt criticized and unsupported in relationships with her mother and her sister. Appellant did not appear to have a well-developed network of family relationships (T. 1048, 1059-60). Thus, the evidence supported the fact that Appellant's alleged, but non-existent, family support did not change the harmful conditions that brought the twins into care.

Further, the trial court was in a superior position to judge Appellant's credibility and, not surprisingly, the court did not believe Appellant was now capable of caring for the twins. J.L.M., 815 S.W.2d at 924. The trial court specifically found that, "this Court has no faith that [Appellant] is capable of taking care of the twins or that she has sufficient family support to aid her in taking care of the twins" (L.F. 151; A.App. 49). The court further found that, "this

Court has no confidence at this late hour after the twins have spent practically their entire lives in the custody of caregivers outside of [Appellant] and family…that [Appellant]… would now be able to step forward and properly care for the twins" (L.F. 151).

The court's lack of confidence that Appellant could now take care of the twins, despite Appellant's assurances otherwise, is supported by the evidence. Appellant has lied to courts and to government agencies before. She lied numerous times committing welfare fraud and she lied to the court in Arkansas about her residence (R.Supp.L.F. 16-32, L.F. 149; R.App. 90-94). Appellant even lied to the police, going as far as subjecting one twin to unneeded medical care to get out of a speeding ticket (T. 132-133, 1566). Again, it is not surprising the trial court did not find Appellant's assurances credible.

b. Appellant fails to contest that the conditions that brought these children into care, or conditions of a harmful nature continue to exist.

Appellant does not argue that the aforementioned conditions that brought these twins into care, including Appellant's stress and inability to care for the twins, do not exist or that these conditions of a harmful nature do not exist. Instead Appellant argues the twins do not really have Reactive Attachment Disorder and that Appellant did the four things that DFS asked her to do: a psychological, visit the twins, attend parenting classes and pay child support.

The findings that the twins suffered from RAD were made in the unappealed Jurisdictional and Dispositional Orders (A.App. 17, 30). In addition, simply because a parent completes everything on the list given by DFS, DFS policy does not guarantee custody (T. 437). Sometimes, even though parents complete everything asked, DFS may still decide placement with the parent would not be in the child's best interest (T. 437). Moreover, Appellant's psychological, her visitation with the twins, her attendance at parenting classes and her paying of child support all occurred prior to the Dispositional hearing and were all considered in the Dispositional Order (L.F. 136, 139-140; A.App. 34, 37-38). Even after considering all of this the court found that delivery of the care, custody and control of the twins to Appellant was contrary to the twins' welfare and not in the twins' best interest (L.F. 124, 139-140).

Appellant failed to present any new evidence on any of these issues at the hearing regarding the termination petition (T. 1942). In fact, Appellant failed to present any evidence at all at the termination hearing (T. 1942).

i. The twins' RAD diagnosis was made in the unappealed Jurisdictional and Dispositional Orders <u>and</u> was supported by the evidence.

Appellant spends over six pages of her brief arguing that the twins did not suffer from RAD (A.B. 57-63). The court found the children suffered from RAD in its unappealed Jurisdictional Order of March 2001 (A.App. 17). Again, the

court may use findings on the underlying petition to show termination of parental rights. *See* Interest of L.G., 764 S.W.2d 89, 95(Mo. banc 1989).

Further, the finding of RAD was supported by the evidence. Dr. Luby, a child psychiatrist at Washington University with four years of medical school, three years general psychiatry residency and two years subspecialization in child psychiatry training, all completed in 1990, made the diagnosis (T. 8). Dr. Luby specializes in mental disorders of infants and preschoolers and has evaluated over 100 children under age five in the past ten years (T. 8, 12). Appellant failed to provide any evidence to contradict Dr. Luby's testimony at Jurisdiction regarding the twins diagnosis (T. 596).

In its Dispositional Order the court showed it considered Appellant's evidence regarding the twins' RAD. The court cites testimony from Appellant's witnesses, Jean Fischer, Dean Rosen and Daniel Cuneo who testified the twins did not have the Disorder (L.F. 133; A.App. 31).

Directly after citing this evidence the court states, for a second time, "the Court finds Dr. Luby's testimony to be credible and believable" (L.F. 133). The court then proceeds to explain, in part, why it found Dr. Luby's testimony credible and believable. The court found that Dr. Luby observed the twins in the summer of 2001, shortly after their return from the U.K. and the other witnesses did not observe the twins until early Spring 2002, when the twins had been in Missouri for nearly one year (L.F. 133). The court found that "it stands to reason that the multiple placements and the lack of stability would have a negative impact on the

twins." (L.F. 133). The court stated that it appeared that, based upon the observations of Appellant's experts and Dr. Luby's diagnosis of the moderate disorder in remission, that the twins have been progressing well and are blossoming in their current environment" (L.F. 133).

The appellate court should defer to a juvenile court's ability to determine the witnesses' credibility and to choose between conflicting evidence. In the Interest of M.E.W., 729 S.W.2d 194, 195-196 (Mo. banc 1987);. In the Interest of A.S., 38 S.W.3d 478, 481 (Mo.App. 2001). Further, conflicting evidence should be reviewed in the light most favorable to the trial court's ruling. M.E.W. at 196; In the Interest of J.L.M., 64 S.W.3d 923, 924-925 (Mo.App.2002). In this case, the court specifically finds Dr. Luby credible and even gives part of the reason why. The trial court chose between the conflicting evidence and the Court should not overturn that now.

Moreover, the evidence supported the findings made in the unappealed Jurisdictional and Dispositional Orders incorporated in the Termination Judgment. Dr. Luby has four years of medical school, three years general psychiatry residency and two years subspecialization in child psychiatry training, all of which she completed in 1990 (T. 8). Dr. Luby specializes in mental disorders of infants and preschoolers and has evaluated over 100 children under age five in the past ten years (T. 8, 12).

Dr. Luby observed the children in July and August of 2001 (R.App. 102). Dr. Luby diagnosed the twins with the Axis I mental disorder of Reactive

Attachment Disorder ("RAD") (T. 23, 37). RAD can arise in young children with a very unstable environment early in life, particularly characterized by multiple placements (T. 23)

Dr. Luby testified that, in addition to the twin's history of multiple placements, they had other RAD symptoms (T. 95-96). These symptoms included indiscriminate social ability, a willingness to engage with strangers not appropriate to their age, being relatively apathetic and withdrawn regarding engaging in toys, as well as not demonstrating a level of attachment to their primary caretaker as would be expected from normally developing children (T. 95-96).

At the time of Dr. Luby's exmination of the twins, she found their RAD was in partial remission (T. 26-27). However, Dr. Luby testified that just because their RAD was in partial remission it was unfair to say the twins could bounce back (T. 39). She stated that the twins had multiple and serious risk factors (T. 39). Dr. Luby stated that even if the twins stayed in their current environment, their prognosis was still guarded, but they have a chance of some success (T. 40).

Dr. Luby testified to a reasonable degree of psychiatric certainty that if the twins were moved from their current placement the twins would suffer repeated behavioral and emotional problems as well as developmental problems (T. 39-40). Dr. Luby concluded that a movement in placement would be very detrimental, both developmentally and emotionally, to the twins (T. 39).

Appellant's main witness was Jean Fischer a Marriage and Family Therapist (T. 602). Ms. Fischer is not a licensed medical doctor practicing

psychiatry, a licensed psychologist or a licensed social worker (T. 641). In fact, the court did not find her to be an expert relating to RAD, but only let her testify based on her limited training and experience (T. 615-616). Ms. Fischer said she based her finding the twins did not have RAD on the twins' history, but failed to read all of the history (T. 635-636). Ms. Fischer had never heard of remission in the context of RAD, but the DSM-IV states of RAD that "considerable improvement or remission may occur" (T. 672). Ms. Fischer did, however, agree that because of the multiple moves in the first two years of their lives, she would recommend the twins receive attachment therapy (T. 694, 695). She also admitted that a child with attachment disorder needed structure and consistency (T. 645, 705).

Appellant's second witness, Dr. Rosen, is also not a specialist in the mental health of children (T. 929). Dr. Rosen admitted his experience is mostly in the area of evaluating parents and parenting (928-929). In fact, Dr. Rosen admitted he had never done an evaluation of a child under age two (T. 928). Further, Dr. Rosen's saw the twins eight months after Dr. Luby, and he did not read any of the twin's history prior to observing them (T. 945, 982).

Appellant's final witness, Dr. Cuneo is a clinical psychologist and also the father of one of the law students working on Appellant's case (T. 1073). He saw the twins for one hour on February 19, 2002 in Dr. Rosen's office (T. 1078-79). He testified that he did not see any signs of RAD in that one hour observation (T. 1098). He also admitted that the Washington University School of Medicine

psychiatric department was reputable and good (T. 1105). Again, the trial court chose between the evidence presented and chose to believe Dr. Luby – a psychiatrist at Washington University School of Medicine who specializes in mental disorders of preschoolers and infants.

ii. Appellant's psychological showed no mental illness, but showed numerous other problems regarding her ability to care for the twins.

Appellant compares her case to that of the Appellant in B.C.K.. That case, however, is substantially different from this one. In B.C.K. the children came into care while mother sought treatment for her mental illness and substance abuse, not because of any neglect or abuse of the children. In the Interest of B.C.K. 103 S.W.3d 319, 328 (Mo. App. 2003). In that case the mother got treatment for her mental illness and the court found that "under the unique circumstances of this case, we find the change in Mother's medical condition precipitated the changes in Mother's stability" and rectified the conditions that brought these children into care Id. at 228-330. In the case at bar, Appellant does not have a mental illness that was the cause of the conditions that brought the twins into care. Further, unlike the mother in B.C.K. Appellant has failed to rectify the conditions that brought these children into care. There is no evidence that Appellant's life has changed and that she would be any less overwhelmed with the twins now than she was when they were born.

Appellant places a lot of weight on the fact that Dr. Randich found Appellant psychologically fit to parent – in other words – she did not have a mental illness (L.F. 58-60, A.B. 65). However, many people who are psychologically fit to parent have their parental rights terminated.

Appellant picks out all of the positive things Dr. Randich says about her and fails to mention the numerous problems Dr. Randich found and the concerns Dr. Randich had with returning the twins to Appellant. Dr. Randich testified that it was not clear whether Appellant was willing to parent the twins, and she had concerns about returning the twins to Appellant (L.F. 139).

Moreover, Dr. Randich finds that Appellant "is an immature individual with longstanding problems in adjustment that are likely to have an effect on her ability to cope with the everyday problems of life" (T. 1033, 1058). Dr. Randich's evaluation showed Appellant demonstrated impulsivity and poor judgment and that these were well-ingrained personality characteristics that she would not expect to change radically (T. 1019-1020). Further, Dr. Randich testified these conditions have a negative impact on Appellant's parenting abilities (T. 1054).

Dr. Randich testified that Appellant's decision to stop taking the medication prior to the twin's birth was an example of Appellant's impulsive behavior (T. 1033). Appellant told Dr. Randich she had stopped taking similar medication during a previous pregnancy (T. 1023). Dr. Randich also felt Appellant's decision to place the twins for adoption was an example of her impulsive and poorly thought out behavior (T. 1042-43).

Appellant's test scores indicated Appellant is an immature person who uses repression and denial excessively as defenses. The scores also indicated that Appellant has a low tolerance for stress, meaning she may have more difficulty parenting (T. 1018-1019, 1053). Dr. Randich confirmed that Appellant was overwhelmed with the care of the twins and that Appellant was under a lot of stress and lacked family support (L.F. 139; A.App. 37). Dr. Randich further stated she was concerned about the level of stress Appellant would be under if the twins were returned to her (T. 1025).

The conditions that brought these children into care, Appellant's stress and admitted inability to care for the twins, continues to exist. Appellant presented no evidence that her life had changed. Further, with their diagnosis of RAD, the twins now, more than ever, need a stable environment. The evidence has shown that Appellant could not give them a stable environment when they were first born and she cannot give one to them now.

B. Clear, cogent and convincing evidence supports the finding Appellant was unfit to be a party to the parent and child relationship, pursuant to Section 211.447.4(6) RSMo.

Section 211.447.4(6) allows for termination of parental rights when a parent is unfit to be a party to the parent and child relationship because of a consistent pattern of abuse or because of specific conditions directly relating to the parent's relationship with the child rendering the parent unable, for the reasonably

foreseeable future, to care for the physical, mental and emotional needs of the child. *Section 211.447.4(6) RSMo*. In this case, the trial court found both a consistent pattern of abuse and specific conditions directly relating to Appellant's relationship with the twins, which made her unfit. (L.F. 107; A.App. 5).

All of the findings by the court that Appellant disputes in this section of her brief come, again, from the court's unappealed Jurisdictional Order. In that Order the court specifically found "[Appellant] is an unfit mother" and cited reasons why (L.F. 119-120; A.App. 17-18). These things included that Appellant accepted gifts unrelated to reasonable adoption expenses, that she claimed the twins were in her care when they were not to qualify for greater public assistance benefits for herself, that she failed to provide the twins adequate medical care by failing to take medication to prevent preterm labor, that she failed to take the twins to medical appointments and that she was overwhelmed and highly stressed with the birth of the twins (L.F. 119-120). Again, Appellant should have appealed that Order if she felt the findings were in error.

While the evidence supported those findings, the court made additional findings of unfitness in its Termination Judgment which are not addressed by Appellant, thus they are uncontested. The court, in its Termination Judgment found Appellant unfit to be a party to the parent and child relationship because of her consistent pattern of emotional abuse and because of specific conditions directly relating to her relationship with the twins (L.F. 107; A.App. 5). The court found these conditions included, but were not limited to: Appellant's continued

stress and being overwhelmed with the reality of the twins, Appellant's continued indecisiveness in dealing with the twins and their welfare and the lack of family support for Appellant in caring for the twins (T. 107). The court further references the Jurisdictional and Dispositional Orders to support this finding.

These conditions are similar to the conditions which the court found were harmful to the twins pursuant to Section 211.447.4(3) RSMo., as discussed previously. Again, there was plenty of evidence to support that Appellant's life had not changed and that these conditions were of a duration and nature rendering Appellant unfit and unable for the reasonably foreseeable future to care appropriately for the needs of the twins, as found by the court (T. 107; A.App. 5).

1. Cumulatively, the evidence showed Appellant's unfitness to parent the twins

The items identified in the Jurisdictional Order and those the court cited in its Termination Judgment showed Appellant unfit to be a party to the parent and child relationship with the twins. Appellant argues that each of these items individually should not be enough to terminate her parental rights (A.B. 70-74). However, it was the cumulative nature of these items that show Appellant's unfitness.

Appellant makes the laughable argument that she did not exploit her children, but that she "has always held the needs of her children above her own" (A.B. 70). As mentioned previously, Appellant thought only of herself, from the time she stopped taking the medication to prevent the premature birth of the twins

to the time she decided she wanted them back simply because she was upset about the allegations she sold them on the internet (T. 1485, 1595).

Appellant did nothing but use the twins for her own gain. Appellant took one of the babies to the hospital unnecessarily to get out of a speeding ticket and used the twins to defraud the government of additional public assistance (T. 132-133, 1566; L.F. 119; A.App. 17). Moreover, the evidence showed Appellant received $100 earrings, $315 in toys and gifts for her children, another $150 worth of clothes for her children and a $50 hair braiding from the pre-adoptive parents (L.F. 119, T. 136-137, 139). Even Appellant's choice of adoptive parents for the twins showed she simply used them. Appellant admitted she chose the Kilshaws because she thought it would be a good experience ***for her*** to be able to go to England (T. 211). Appellant gave no other reason why she thought the Kilshaws would be good parents for the babies.

In addition, Dr. Randich testified that Appellant is concerned about how she is perceived by others and she is aware of the socially correct response to various situations (T. 1020). This would explain why Appellant, by her own admission, wanted the twins back because she was upset by the allegedly false allegations she sold the twins on the internet (T. 1485, 1595). Especially when, according to Dr. Randich, Appellant did not have a psychological attachment with the twins (T. 1051).

Appellant argues she is not liable in tort for causing prenatal injury to her twins by failing to take her medication (A.B. 71). That may be true, but the

petition did not allege a tort. Perhaps the twins will sue for compensation when they are older.

Moreover, the argument by Appellant that actions while pregnant cannot be used as evidence to show she is an unfit parent is ludicrous. The statute itself contemplates that actions prior to the birth of a child can be used to show unfitness. Section 211.447.4(6) allows for a presumption of unfitness when a parent has had her parental rights involuntarily terminated within the past three years. Section 211.447.4(6) RSMo. Thus, the statute anticipates looking to a parent's actions in the three years prior to the birth of a child for evidence of unfitness. Thus, Appellant's actions showing her impulsivity and poor judgment prior to the birth of the twins can be used as evidence to show unfitness.

2. Appellant would be overwhelmed with stress, *again,* if the twins were returned to her; thus she is unfit.

In addition to the above issues, Appellant admits numerous times that she was overwhelmed with the birth of the twins and the care that was needed for them (A.B. 73, T. 1459). Although no evidence was presented to show it, Appellant argues that since the time of the adjudication (Jurisdiction) and Dispositional hearings, Appellant had grown in her ability to care for the children through parenting classes and therapy sessions. Appellant, however, fails to acknowledge that those parenting classes and therapy sessions were done before the Jurisdictional and Dispositional hearings. Thus, the court considered

Appellant's parenting classes and therapy sessions when it made its Jurisdictional finding of unfitness.

Appellant failed to put on a single witness or present any evidence regarding any alleged change at the termination hearing (T. 1942). In fact, Appellant failed to present any evidence at all at that hearing (T. 1942). As argued previously, the evidence supported the court's finding that Appellant would continue to be overwhelmed with the needs of the twins and thus, that Appellant is unfit to be a party to the parent and child relationship.

That is especially the case because the twins are in need of even more care now than they were when Appellant first brought them home. The twins have multiple and serious risk factors and need a stable and reliable caregiver (T. 39, 85). Moreover, the evidence showed that the challenge and burden of parenting these twins with RAD was exceedingly high and that they would require a lot of support as well as probable psychiatric and development intervention for quite some time (T. 37, 40).

The evidence showed that Appellant did not have the stability necessary to be a fit parent for these twins. Dr. Randich testified that Appellant was impulsive and had poor judgment – well ingrained personality characteristics that had negative impact on her parenting abilities. Dr. Randich testified that Appellant has a low tolerance for stress and may have more difficulty parenting and that she was concerned about the level of stress Appellant would be under if the twins were returned to her (T. 1018-1019, 1025, 1053). A similar concern was expressed by

the court in support of its grounds for terminating Appellant's parental rights (L.F. 106-108, 119-120; A.App. 4-6, 17-18). Finally, Dr. Randich testified that, regarding Appellant, "the best predictor of future behavior is past behavior" (T. 1041). The evidence showed Appellant's past behavior was to be overwhelmed with the twins and to use them for her personal gain, while causing them permanent harm.

III. The trial court did not abuse its discretion when it found that termination of Appellant's parental rights was in the twins' best interest; further the court made findings, supported by the evidence, on the appropriate and applicable factors in Section 211.447.6 RSMo.

A. The trial court did not abuse its discretion when it found termination of Appellant's parental rights was in the twins' best interest.

Appellant's only argument that termination is not in the twins' best interest is that the court failed to make findings on the appropriate and applicable factors in Section 211.447.6 RSMo. That is because the evidence is clear - it is in the best interest of the twins to stay in the stable foster home where they have been thriving. Dr. Luby testified that the twins would suffer repeated behavioral, emotional and developmental problems if they are moved to another placement (T. 39-40). Further, the challenge and burden of parenting these premature twins with RAD is exceedingly high (T. 37). They require a lot of support and will probably

require psychiatric and development intervention for some time (T. 40). These twins need a stable and reliable caregiver (T. 85).

Appellant still thinks that she can give parenting the twins one more try and she can give up if it does not work out. This is evidenced by the fact that she told the foster parent she wanted to make another "run of taking care of the children" (T. 304). Parenting is not something you can take a "run" at. Dr. Randich's psychological evaluation of Appellant and her own actions cited throughout this brief show that Appellant is not the stable and reliable caregiver the twins need. Appellant demonstrates the well-ingrained characteristics of impulsivety and poor judgment (T. 1019-1020). This is exemplified by Appellant's decision to stop taking the medication prior to the twins' birth and Appellant's decision to place the twins for adoption (T. 1023, 1042-1043). Appellant "is an immature individual with longstanding problems in adjustment that are likely to have an effect on her ability to cope with everyday problems of life (T. 1033, 1058).

It is the trial court's duty to weigh the evidence presented in reaching a conclusion as to a child's best interests. In Interest of M.J., 66 S.W.3d 745, 749 (Mo. App. 2001). Evidence is not reweighed by appellate review. Id. Further, a finding of best interests will only be disturbed on appeal if the trial court has abused its discretion. *See* In the Interest of A.M.W., 64 S.W.3d 899, 906-907 (Mo.App. 2002). The findings of the trial court were supported by all of the evidence previously argued in this brief and there was no abuse of discretion.

B. The trial court made findings on the appropriate and applicable factors in Section 211.447.6 RSMo.

Section 211.447.6 RSMo. requires findings on seven factors, if ***appropriate and applicable***, when the court finds on ***some*** of the grounds for termination. *Section 211.447.6 RSMo*. (emphasis added). In this case, the grounds requiring findings pursuant to Section 211.447.6 RSMo. were: 1) Appellant's failure to rectify the conditions bringing the children into care or harmful conditions that still exist, pursuant to 211.447.4(3) RSMo.; 2) Appellant's failure to provide the children with the care and control necessary for their health and development, pursuant to 211.447.4(2) RSMo.; and 3) the children have been in care 15 out of the most recent 22 months, pursuant to Section 211.447.2 RSMo. *Section 211.447.6 RSMo*.

The court was not required to consider these factors when it found Appellant unfit to be a party to the parent and child relationship, pursuant to 211.447.4(6) RSMo. *See Section 211.447.6 RSMo; See* In the Interest of C.N.W., 26 S.W.3d 386, 394 (Mo.App. 2000); In the Interest of M.M., 973 S.W.2d 165, 170 (Mo.App. 1998). Thus, even assuming *arguendo*, that the court did not make appropriate findings as to these factors, the Judgment should still be affirmed on the unfitness ground, as one ground alone is sufficient to terminate parental rights. In the Interest of E.L.B., 103 S.W.3d 774, 776 (Mo banc 2003).

Appellant argues the court failed to make findings on statutory factors (2) through (5) and that the findings the court made concerning factors (1) and (7) were not supported by the evidence. The subsections at issue are as follows:

(1) The emotional ties to the birth parent;

(2) The extent to which the parent has maintained regular visitation with the child;

(3) The extent of payment by the parent for the cost of care and maintenance of the child;

(4) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time;

(5) The parent's disinterest in or lack of commitment to the child.

(6) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or emotional harm. *Section 211.447.6 RSMo.*

Further, "[s]ection 211.447.6 does not mandate a specific finding as to each of the listed factors. (citation omitted). Rather it only requires findings as to those factors that are 'appropriate and applicable to the case'" In the Interest of K.C.M., 85 S.W.3d 682, 695 (Mo.App. 2002). Because the factors in Section 211.447.6 RSMo. are discretionary, "the scope of appellate review is limited to an abuse of discretion." A.S.O. at 67 (quoting T.A.S., 32 S.W.3d at 811).

Further, there is no "requisite specificity for the 211.447.6 factors." K.C.M. at 695. The "reviewing court only needs to be assured that the juvenile court properly considered the statutory factors of Section 211.447.6 RSMo. in deciding whether to terminate parental rights" Id. at 696. In addition, even if a court does not make findings on appropriate and applicable factors the court need only reverse and remand for the trial court to make the requisite finding of that factor and then determine whether to terminate. In the Interest of N.M.J., 24 S.W.3d 771, 783 (Mo.App.2000).

Appellant interprets K.C.M. as providing that Appellant has the burden on appeal of showing when a factor in the Section is appropriate and applicable, and thus, when the court need make a finding on that factor (A.B. 75). In addition, Appellant interprets K.C.M. as finding that Appellant must show a resulting prejudice to her if the court did not make appropriate findings and that such findings would favor her (A.B. 75). While the trial court made findings on all of the appropriate and applicable factors, Appellant did not show any resulting prejudice to her of any alleged inappropriate findings.

C. The trial court did not err when it made findings as to Section 211.447.6 subsections (2)-(5) RSMo.

Appellant erroneously argues the trial court erred in failing to make findings regarding Section 211.447.6(2)-(5) RSMo. The court's orders in this case, all of which are incorporated into the Termination Judgment, are extremely

lengthy and thorough and consider evidence of every appropriate and applicable factor in Section 211.447.6.

1. The court made findings regarding the extent of Appellant's visitation, pursuant to Section 211.447.6(2) RSMo.

The court considered the factor in 211.447.6(2), the extent to which the parent has maintained regular visitation or other contact with the child. In its Dispositional Order, incorporated into the Termination Judgment, the court specifically found that up to the time of the Dispositional hearing on April 23, 2002, Appellant had been visiting with the twins on a regular basis. (L.F. 149). The court's Permanency Planning Order of May 24, 2002, also incorporated into the Termination Judgment, the court specifically stated that Appellant was not allowed to visit with the twins after June 23, 2002 (L.F.154; A.App. 52). Thus, the court said all it could regarding the issue of visitation in its incorporated orders. Moreover, the issue was not appropriate and applicable to the case after Disposition because the trial court ended Appellant's right to visit with the twins, which was clearly stated in the court's orders.

2. The court made findings regarding Appellant's payment of support, pursuant to Section 211.447.6(3) RSMo.

Next Appellant erroneously argues the trial court erred in failing to make a finding regarding 211.447.6(3), the extent of payment by the parent for the cost of care and maintenance of the child. However, again, the trial court specifically finds, in its incorporated Dispositional Order that Appellant was current in her

child support obligation. (L.F. 136; A.App. 34). Thus, the trial court was aware of the amount of support Appellant paid and considered that factor when deciding to terminate Appellant's parental rights. Appellant incorrectly states the court found this payment "irrelevant" and not "applicable." (A.B. 78). Appellant is referring to a Section of the court's order where the court says that if it does not make findings on a Section it does not find it relevant or applicable (L.F. 109; A.App. 37). However, the court did find Appellant paid child support.

3. The court made findings that additional services would not enable return of the twins to Appellant within an ascertainable period of time, pursuant to Section 211.447.6(4) RSMo.

The trial court also made specific findings with respect to Section 211.447.6(4), whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time. The trial court found that no further preventive or reunification efforts by DFS could have prevented or shortened the separation of the twins from the family (L.F. 149). In addition, the trial court found continued efforts at reunification and/or visitation by Appellant would be detrimental to the twins' best interests and welfare and would impair their emotional development and that DFS should not engage in further reasonable efforts to effect delivery of the twins to the custody of Appellant (L.F. 151,157).

4. The court made findings Appellant showed a lack of commitment to the twins, pursuant to Section 211.447.6(5) RSMo.

Regarding the factor in Section 211.447.6(5), the parent's disinterest in, or lack of commitment to the child, the court not only considers Appellant's disinterest in and lack of commitment to the twins, but specifically sets out some of the actions of Appellant demonstrating this disinterest and lack of commitment and how these actions caused the twins emotional harm. These actions are set out in the many Orders and Judgments incorporated into the Termination Judgment. One action demonstrating a disinterest in and lack of commitment to the twins is the court's finding that Appellant's actions caused the twins to be subject to numerous unstable, inappropriate, temporary placements in various states and countries, within a span of a few months. The court goes on to specifically find that the number and nature of said placements have not been in the best interest of the twins and have caused emotional harm to the twins. (L.F. 118, 131).

Other actions and findings cited by the court show Appellant's disinterest in and lack of commitment to the twins include: Appellant's failure to take her medication to prevent the twins' premature birth; Appellant's missing the twins' first appointment with their pediatrician; Appellant's failure to continue an iron supplement recommended by the twins' pediatrician; Appellant exploiting the twins for personal gains; and the fact that the twins were in Appellant's sole care, custody and control only a total of about fifty days since their birth (L.F. 119, 127,

132, 137, 140, 142; A.App. 117, 125, 130, 138, 140). In addition, the court cites testimony of Dr. Randich that it was not clear whether Appellant was willing to parent the twins (L.F. 139). Finally, the court cited Appellant's own admission that, once she made the decision to have the twins adopted, she was fine with that decision until the adoption hit the media in January 2001 (L.F. 140).

Again, the court's orders in this case, all incorporated into the Termination Judgment, are extremely thorough. The court cites over eleven pages of relevant testimony from many of the thirty-two witnesses it heard (L.F. 132-143). The trial court was not required to specify the statutory Sections in its Termination Judgment, the court was just required to make the appropriate findings. In the Interest of L.M., 807 S.W.2d 195, 199 (Mo.App.1991)("recitation in the court's order of the statutory basis for is decision is superfluous"). In all of these numerous pages of findings and considerations – it is clear the court considered carefully all of the applicable factors in Section 211.447.6 RSMo**.**

D. The evidence supports the trial court's findings regarding Section 211.447.6(1) and (7) RSMo.

1. The evidence supports the court's finding the twins had no emotional ties to Appellant, pursuant to Section 211.447.6(1) RSMo.

Appellant also erroneously asserts that there was insufficient evidence to support the court's finding that the twins have no emotional ties to Appellant,

pursuant to Section 211.447.6(1). However, there was a plethora of evidence supporting that these young babies had no emotional ties to Appellant.

Appellant admitted and the court found, the twins were in Appellant's sole care, custody and control for only about 50 days during the first two crucial bonding years of their lives (L.F. 132, 142, 157; A.App. 30, 40, 55). Appellant also admitted that she did not see the twins from December 11, 2000 until April of 2001. (L.F. 142).

When the twins came back to Missouri in April of 2001 they had twice monthly visits with Appellant (T. 338). The evidence showed that during these visits when Appellant tried to hug the twins, they would just look at her, and sometimes they would back away (T. 518). The twins had no physical contact with Appellant unless she approached them (T. 518, R.Supp.L.F. 157; R.App. 185). In January of 2002, after many months of visiting with Appellant, Barb Flory, the facilitator of the visits between Appellant and the twins, noted that when the twins were tired or upset they looked to her, not Appellant for comfort (R.Supp.L.F. 157; R.App. 185). Further, when the twins needed help with toys they brought them to Ms. Flory, not Appellant (R.Supp.L.F. 157). At the end of one visit one twin went to Ms. Flory, lay against her back, grabbed her around the neck and laid her head on Ms. Flory's shoulder – displays of affection neither twin ever showed Appellant (R.Supp.L.F. 157; R.App. 185). This was in direct contrast to the evidence regarding how the twins acted with the foster parents. The twins would fight to sit on the foster parents laps and when they were reunited

with the foster parents after brief absences they were happy, smiling and would kick with joy (T. 294, 296-297, 340). Finally, Dr. Randich testified that Appellant had no psychological attachment to the twins and the twins were not likely to be attached to Appellant (T. 1051).

2. The evidence supports the court's finding Appellant subjected the twins to a substantial and real risk of mental harm, pursuant to Section 211.447.6(7) RSMo.

Appellant also complains that the evidence does not support the trial court's finding made pursuant to Section 211.447.6 (7). The trial court found, pursuant to this subsection, that there were "deliberate acts of [Appellant,] who knew or should have known that said acts would subject the twins to a substantial and real risk of physical and mental harm" (L.F. 108; A.App. 6). As previously discussed herein, the court found in its Termination Judgment and in its prior Dispositional Order that Appellant subjected the twins to severe and recurrent acts of emotional abuse (L.F. 106, 148; A.App. 4, 46). Again, if Appellant wanted to claim this was an error, she should have followed through with her appeal of the Dispositional Order. Further, again, Appellant's actions of abuse encompassed far more than simply putting the twins up for adoption. These points were set out more thoroughly in Point II of Respondent's Brief and are incorporated herein. Finally, it was appropriate and applicable that the court make a finding and consider this subsection, and the evidence supported its finding.

Thus, the court properly considered and made findings on all of the appropriate and applicable statutory factors of Section 211.447.6. The trial court drafted extremely thorough and detailed Orders and Judgments regarding this case and it did not abuse its discretion with respect to these findings.

CONCLUSION

The Orders generated by the trial court in this matter, from Jurisdiction, Disposition and Termination are extremely thorough. It is clear from the over 58 pages of orders that the trial court thought very carefully about the conclusions it was drawing and considered all of the evidence presented. The trial court wanted to leave nothing to chance on appeal in this matter. Further, when conflicting evidence was presented, the court stated what evidence it found credible and even gave some of its reasoning. The Supreme Court could not have asked for a more thorough Order.

Appellant failed to raise the constitutionality of the fifteen out of twenty-two grounds prior to appeal. Thus, unless this court wants appellate courts to become trial courts, that ground must be affirmed in this case, and only one ground is necessary for termination of parental rights. In the Interest of E.L.B., 103 S.W.3d 774, 776 (Mo. banc 2003).

Further, the evidence supported the grounds for termination of parental rights. Almost all of the evidence was presented, and findings made, in the Jurisdictional and Dispositional Orders. Appellant cannot now go back and argue that these findings, such as Appellant's commission of a severe and recurrent act

of abuse, were in error. The trial court was allowed to base its Termination Judgment on these prior findings. In the Interest of L.G., 764 S.W.2d 89, 95(Mo. banc 1989); In the Interest of L.M., 807 S.W.2d 195 (Mo.App. 1991). Thus, the evidence supported that Appellant committed a severe and recurrent act of abuse, that the conditions that brought these twins into care, or conditions of a harmful nature, continued to exist and that Appellant is unfit to be a party to the parent and child relationship with these twins.

In addition, the trial court did not abuse its discretion when it found that termination was in the best interest of the twins. Appellant cannot provide the stability they need and they are thriving in their pre-adoptive environment. A decision other than termination could force these very vulnerable twins to be taken from the only stable environment they have ever known, subjecting them to emotional and developmental harm (L.F. 107-108; A.App. 5-6).

For these and all of the reasons set forth herein, the trial court's judgment terminating the parental rights of Appellant to K.M. should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Respondent's Brief, Respondent's Appendix Vol. 1 and Vol. 2, Respondent's Supplemental Legal File and a disk containing Respondent's Brief were served upon each of the following by depositing same in the United States Mail, postage prepaid on January 2, 2004:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

This brief complies with the limitations of Rule 84.06(b) and Rule 360 and contains 24,517 words. Appellant also certifies that a floppy disk has been filed along with this brief and that the disk has been scanned for viruses and is virus free.

_____

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